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No. 99-_____

IN THE
SUPREME COURT OF THE UNITED STATES

THE PEOPLE'S MOJAHEDIN ORGANIZATION OF IRAN

Petitioner,

v.

UNITED STATES DEPARTMENT OF STATE and
MADELEINE K. ALBRIGHT, Secretary of State

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the D.C. Circuit's standard of judicial review for State Department designations of "foreign terrorist organizations" (under 8 U.S.C. § 1189) is contrary to Article III's requirement of judicial independence and to the terms of the governing statute.

(2) Whether the D.C. Circuit's holding that Petitioner was not present in the United States and therefore unable to raise a constitutional challenge to its designation as a "foreign terrorist organization" is in conflict with cases decided by this Court.

LIST OF PARTIES

The parties to the proceeding below consisted of the People's Mojahedin Organization of Iran and the Liberation Tigers of Tamil Eelam as petitioners and the Department of State and Madeleine K. Albright as respondents. The petitioner organizations filed separate petitions for review in the D.C. Circuit from the order of the Department of State. The cases were argued the same day before the same panel of judges, and the D.C. Circuit disposed of both petitions in the same decision. It is the understanding of the People's Mojahedin Organization of Iran that the Liberation Tigers of Tamil Eelam has not filed a petition for writ of certiorari from the judgment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 25, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. A., pp. 1a-15a, *infra*) is reported at 182 F.3d 17. The Department of State's Order of October 2, 1997 entitled Designation of Foreign Terrorist

Organizations (Pet. App. B, pp. 16a-22a, *infra*) is reported at 62 Fed. Reg. 52650. The order of the D.C. Circuit denying petitioner's petition for rehearing (Pet. App. C., p. 23a, *infra*) is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit was issued on June 25, 1999. Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc*, which was denied on August 27, 1999. Chief Justice William H. Rehnquist granted a timely application for extension of time to file a petition for a writ of certiorari to and including December 25, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Art. III, section 1:

The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Constitution, Art. III, section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority.

8 U.S.C. § 1189 (reproduced in full at Pet. App. D, pp. 24a-28a, *infra*).

8 U.S.C. § 1189(a):

Designation

(1) In general

The Secretary is authorized to designate an organization as a foreign terrorist organization in

accordance with this subsection if the Secretary finds that—

(A) the organization is a foreign organization;

(B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title); and

(C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.

8 U.S.C. § 1189(b):

Judicial Review of Designation

(1) In general. Not later than 30 days after publication of the designation in the Federal Register, an organization designated as a foreign terrorist organization may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit.

* * *

(3) Scope of review. The Court shall hold unlawful and set aside a designation the court finds to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege or immunity;

(C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;

(D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under paragraph (2), or

(E) not in accord with the procedures required by law

STATEMENT

1. Introduction. The People's Mojahedin Organization of Iran (the "PMOI") was formed to resist the dictatorial regimes that have controlled Iran for the past several decades. The PMOI seeks the institution of a democratic government in Iran and promotes the recognition of basic human rights for Iranian citizens, such as gender equality, religious freedom, and freedom of expression and political association.

The PMOI is an anti-fundamentalist organization with many supporters/adherents worldwide who receive information from it, participate in activities it sponsors and contribute money to its cause. The PMOI coordinates demonstrations in the United States and elsewhere that protest the government of Iran and its oppressive policies. It has raised a volunteer army, consistent with principles espoused in the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, to defend Iranian citizens against domestic political suppression and acts of terrorism by the government. 1996 U.S. State Department Report: Patterns of Global Terrorism, www.state.gov/www/global/terrorism/1996Report/1996index.html ("Iran remained the premier state sponsor of terrorism in 1996" and the PMOI is one of its "primary targets"). In the lower court, the PMOI denied that it is a "terrorist organization," and maintained that it eschews violence against innocent civilians, supports the Middle East peace process, and does not endorse or claim credit for acts of international terrorism. Brief of PMOI at 6 & Addendum D (Letter sent to President Clinton after designation of PMOI, attaching statement of 224 Members of Congress, which described the PMOI as "legitimate resistance against one of the most brutal dictatorships in modern history").

2. The Secretary Designates PMOI As A Foreign Terrorist Organization. Pursuant to 8 U.S.C. § 1189 [the "Statute"], the Secretary of State compiled an administrative record purportedly concerning activities of the PMOI. The administrative record contained both classified and public information. The PMOI was not notified by the Department that this record was being compiled and was not given the opportunity to present information for inclusion in the record or to refute any of the information collected by the Secretary.

Based on this one-sided record, the Secretary of State determined that the PMOI is a foreign organization that engages in terrorist activity that threatens the security of U.S. nationals or the national security of the United States, and published the designation in the Federal Register. Pet. App. B at 20a. Consequences of this designation include (1) a block on any funds the organization has in the United States, 18 U.S.C. § 2339B(a)(2); (2) exclusion of its representatives from this country, 8 U.S.C. § 1182; and (3) criminal prosecution of any person who knowingly provides "material support or resources" to the organization. 18 U.S.C. § 2339B(a)(1).

3. The D. C. Circuit Denies the PMOI's Petition for Review. Within thirty days of the Secretary's designation, Petitioner filed a petition for review in the D.C. Circuit. The petition challenged the Secretary's designation on multiple grounds, based upon both the statute and the Constitution.[1]

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[1] In its constitutional challenges, the PMOI asserted that: (1) Section 1189, on its face and as applied, deprived the PMOI of liberty and property without due process; (2) the designation violated the PMOI's First Amendment associational rights; (3) the statute is overbroad under the First Amendment because its requirement of a "threat to foreign relations" encompasses protected activity; and (4) the judicial review provision of the statute deprives organizations of due process, because it permits court decision on the basis of an *ex parte* record. The PMOI's statutory claims included arguments that: (1) the designation was arbitrary and capricious because undertaken for impermissible political

The Court of Appeals for the D.C. Circuit declined to set aside the designation. The court began its opinion by emphasizing the unusual nature of the Statute. Unique features stressed by the court include the compilation of an administrative record without an adversary hearing or notice to the entity affected, the continuing secrecy of parts of the record throughout the judicial review process, and the lack of traditional safeguards to ensure the reliability of the information on which the agency relied. Pet. App. A at 2a-3a. Due to these statutory anomalies, the court disclaimed any ability to evaluate the facts that underlay the agency's decision (*id.* at 3a):

> What follows in the next two subsections may or may not be facts. The information recited is certainly not evidence of the sort that would normally be received in court. It is instead material the Secretary of State compiled as a record, from sources named and unnamed, the accuracy of which we have no way of evaluating.

Nonetheless, the D.C. Circuit proceeded to recount quoted snippets from portions of the State Department's record. The excerpts it chose to reproduce in its opinion described several incidents of violence that the State Department attributed to the PMOI – all of which occurred before 1995. *Id.* at 5a-6a.

The court acknowledged that the administrative record disclosed that the PMOI "has offices and members throughout . . . North America . . . [which] organiz[e]

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motives; (2) the designation did not meet the statutory criteria, which require a threat to U.S. nationals or the national security; and (3) the Secretary's designation lacked substantial support in the record of terrorist acts that could be ascribed to the PMOI.

activities such as demonstrations." *Id.* at 6a. Despite this finding, the court quickly dispensed with all of the PMOI's constitutional claims by holding that the PMOI has no presence in the United States and is therefore unable to invoke any of this country's constitutional protections. Recognizing that aliens who "come within the territory of the United States and develop[] substantial connections with this country" may assert such rights, the court nonetheless held that the PMOI "ha[d] no presence in the United States," because its status as a "foreign organization" under the Statute was not contested. *Id.* at 10a.

Turning to Petitioner's statutory claims, the court found nonjusticiable the Secretary's determination that the Petitioner's activities constituted a threat to the security of U.S. nationals or the national security. *Id.* at 11a. It then held that the administrative record contained "substantial support" for the finding that the PMOI engages in terrorist activities. The court characterized this conclusion as "not surprising," because it was unable to "reach any judgment whatsoever regarding whether the material before the Secretary is or is not true." *Id.* at 15a. The court emphasized that its conclusion flowed directly from the exceedingly narrow standard of review it applied (*id.*):

> As we see it, our function is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism. Her conclusion might be mistaken, but that depends on the quality of the information in the reports she received—something we have no way of judging.

The court denied a petition for rehearing and suggestion for rehearing *en banc*.[2]

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[2] The Statute provides that a designation of a foreign terrorist organization expires after two years, 8 U.S.C. § 1189(a)(4)(A), and that

REASONS FOR GRANTING THE WRIT

This case presents two issues worthy of this Court's review. First, the D.C. Circuit's interpretation of the "substantial support" standard of judicial review in the Statute both disregards this Court's jurisprudence forbidding Article III courts from acting as "rubber stamps" for the political branches, and cannot be reconciled with this Court's interpretation of the nearly identical "substantial evidence" standard in the Administrative Procedure Act. Second, the decision below announces an unprecedented, restrictive standard for determining when a person is "present in the United States" for purposes of invoking the protection of the Constitution.

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the Secretary may redesignate the organization for an additional two year period "upon a finding that the relevant circumstances . . . still exist." *Id.* at § 1189(a)(4)(B). After the D.C. Circuit denied the petition for rehearing, but before the expiration of the time for filing a petition for certiorari, the two-year anniversary of the Secretary's designation passed. Using the same procedures challenged in this lawsuit, the State Department redesignated PMOI as a foreign terrorist organization on October 8, 1999. 64 Fed. Reg. 55111. PMOI has filed a petition for review in the D.C. Circuit challenging the redesignation. The redesignation of the PMOI and subsequent challenge of the redesignation does not render this action moot. Because the normal appellate review process takes longer than the two-year designation period, this is a classic example of an issue that is capable of repetition, yet evading review. *Southern Pacific Terminal Company v. ICC*, 219 U.S. 498 (1911) (reviewing administrative order expiring after two years); *United States v. N.Y. Telephone Co.*, 434 U.S. 159 (1977) (reviewing authorization of pen register surveillance after surveillance completed); *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 186-87 (1982) (reviewing education program for disabled children after school year ended); *Brock v. Roadway Express*, 481 U.S. 252 (1987). Due to the redesignation, the sanctions that flowed from the original designation have continued to affect the PMOI without interruption. And, because the issues presented by the original designation are also posed by the redesignation, the controversy over the issues raised in this petition remain live.

I. THE STANDARD OF JUDICIAL REVIEW APPLIED IN THIS CASE IS CONTRARY TO THIS COURT'S DECISIONS INTERPRETING ARTICLE III OF THE CONSTITUTION AND THE APA

A. Article III Forbids Courts from Rubber-Stamping Political Decisions – This Court has consistently rejected interpretations of statutes that "cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct." *Katia Gutierrez de Martinez v. Lamago*, 515 U.S. 417, 426 (1995). In *de Martinez*, this Court noted that while "Congress may be free to establish a scheme without Court participation," "that is a matter quite different from instructing a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate." *Id.* at 429. Simply put, "Congress [may not] assign[] to the federal court only rubber stamp work." *Id.*[3]

In *Mistretta v. United States*, 488 U.S. 361, 407 (1989), the Court observed:

> The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colors of judicial action.

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[3] *See also Burlington Northern R.R. Co. v. Department of Revenue*, 934 F.2d 1064, 1072 (9th Cir. 1991) ("the district court's rubber stamp of the master's order is an inexcusable abdication of judicial responsibility and a violation of Article III of the Constitution"); *In re Ahmad*, 726 F. Supp. 389, 412 (E.D.N.Y. 1989) (holding that under Article III, courts cannot "rubber stamp" extradition, "[d]espite the fact that the executive branch has a . . . right to conduct foreign policy").

The decision below employed judicial review criteria that eviscerate any *bona fide* independent judicial check on Executive Branch "findings," and reduce the judicial role to that of a rubber stamp for the Executive Branch's political decision.

In an admirable exercise of intellectual candor, the lower court explicitly disavowed *any* assessment of the credibility or reliability of any of the information in the administrative record. At the outset of its opinion, the court explained that it could not "lay out the facts" on which it would base its judicial review, because the "administrative record" was devoid of "evidence of the sort that would normally be received in court." Pet. App. A at 3a. Instead, the court reiterated verbatim material in the Secretary's record "*the accuracy of which [the court had] no way of evaluating.*" *Id.* (emphasis added). At the end of its opinion, it warned not only that the Secretary's "conclusion might be mistaken" but also that it "depends on the quality of information in the reports she received—*something we have no way of judging.*" Pet. App. A at 15a (emphasis added).

B. The Rubber Stamp Approach of the D.C. Circuit Contrasts with the Meaningful Review Required by This Court in Other Contexts – The D.C. Circuit expressly limited its review to the "face" of the information the Department chose unilaterally to put in the "record," Pet. App. A. at 15a, and eschewed any *judicial* responsibility for assessing its reliability. A paradigm of a judicial rubber stamp, the decision casts off the basic requirements of Article III as outlined in cases discussing judicial review of search and arrest warrants.

A reviewing court, in determining whether a magistrate had a substantial basis for finding probable cause to issue a warrant, must satisfy itself that the record supporting the warrant contains sufficient information to permit the magistrate "to assess independently the probability that the

petitioner committed the crime." *Giordenello v. United States*, 357 U.S. 480, 486 (1958). The police officer's affidavit must support the magistrate's independent assessment of the reliability of the information and its source "if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." *United States v. Ventresca*, 380 U.S. 102, 109 (1965). In *Illinois v. Gates*, 462 U.S. 213 (1983), this Court reaffirmed that a court reviewing a magistrate's probable cause determination must satisfy itself that the record before the magistrate contained sufficient information to support "a conscientious assessment of the basis for crediting [informer] tips" and the "veracity" and "basis of knowledge of persons supplying hearsay information." *Id.* at 238 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)). In the absence of such a record, the magistrate's warrant amounts to an impermissible "perfunctory approval" of inferences drawn by police "officers engaged in the often competitive enterprise of ferreting out crime." *Giordenello,* 357 U.S. at 486-87 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

The Statute at issue here requires that the Secretary of State "find" that "the organization engages in terrorist activities." 8 U.S.C. § 1189(a)(1)(B). The Statute does *not* vest the power of designation in the author of the "CIA research paper," quoted by the lower court. Pet. App. A at 5a. The lower court disavowed any obligation to determine if the Secretary's "administrative record" contained sufficient information to permit her to make her own assessment of the reliability and credibility of the sources and information cited by the CIA officer. It simply rubber-stamped the Secretary's designation.

The lower court's decision is presented to the public as an Article III exercise of "the checking function of judicial review." Pet. App. A at 12a. Congress, in writing the Statute, imbued the courts with a review power cast in the mode of "APA-like" language (Pet. App. A at 9a) – such as

"substantial support," "arbitrary and capricious," "administrative record," and "findings." These familiar judicial concepts lend legitimacy to the decisions of the political branches, and must not be interpreted so as "to cloak their work in the neutral colors of judicial action." *Mistretta*, 488 U.S. at 409.

C. The D.C. Circuit's Interpretation of the Judicial Review Provision Cannot Be Squared with This Court's Interpretation of the APA – The Statute directs courts to "hold unlawful and set aside a designation the court finds to be . . . lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court." 8 U.S.C. § 1189(b)(3)(D). As the lower court observed, the Statute's judicial review provision "generally parrot[s] the language of the Administrative Procedure Act." Pet. App. A at 14a n.8. Indeed, the structure and language of the Statute's judicial review section so closely parallels the APA's familiar judicial review formula that Congress must be presumed to have intended to provide petitioners with at least the level of judicial review ordinarily available for administrative agency decisions that are subject to the "substantial evidence on the record as a whole" test. *Cf. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951) ("the similarity of [the APA and the Taft-Hartley Act] in language and purpose also requires" that both acts be given the same construction).

Indeed, Congress *rejected* the Executive Branch's attempt to secure unilateral and completely unreviewable power to designate foreign organizations as terrorist organizations. After failing to pass a terrorist-designation proposal that contained *no* provision for judicial review,[4]

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[4] On February 9, 1995, the administration transmitted to Congress a bill entitled "the Omnibus Counter Terrorism Act of 1995," introduced as S. 390. *See Terrorism in the United States: The Nature and Extent of the Threat and Possible Legislative Responses. Hearings Before the*

Congress ultimately passed a statute mandating judicial review in "APA-like language." (Pet. App. A at 9a).[5]

Availability of judicial review of terrorist organization designations was a critical factor in congressional passage of the statute. The version of the bill debated in the House of Representatives provided for judicial review based on, *inter alia*, "substantial support in the administrative record taken as a whole." 142 CONG. REC. H2155 (March 13, 1996). Despite the assurance of the bill's sponsors that the

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Senate Comm. on the Judiciary, 104th Congress, 1st Sess. 21 (1995). Section 301(a) of S. 390 empowered the president to designate any foreign organization based on a finding that "the organization engages in terrorism activity" and made the president's designation "conclusive." S. 390, 104th Cong. § 301(a) (1995). Section 202(a) of the bill provided that "the determination by the Secretary of State or the Attorney General that an alien is a representative of the organization [designated as a terrorist organization by the president] shall be controlling and shall not be subject to review by any court." This bill was not enacted.

[5] The lower court took note of the linguistic difference between "substantial support" in the Statute and "substantial evidence" in the APA, and speculated that "[p]erhaps this was in recognition" of earlier D.C. Circuit case law that "whenever a statute requires the agency action be supported by 'substantial evidence...' there must be 'some sort of adversary, adjudicative type procedures' before the agency." Pet. App. A at 14a n.8, *quoting from Mobile Oil Corp. v. FPC*, 483 F.2d 1238, 1259 (D.C. Cir. 1973). The legislative history confirms that Congress intended that the stringency of review under the two standards, in substance, be equivalent. An early version of the proposed terrorist legislation authorized administrative designations of both foreign organizations and representatives of those organizations. H.R. Rep. No. 104-383, at 29 (1995). This early version instructed courts to review organizational designations under the "substantial support" standard. *Id.* ("the court shall hold unlawful and set aside the designation if the court finds a designation to be arbitrary, capricious; abuse of discretion [or]...lacking substantial support in the administrative record taken as a whole"). The House Report stated, with respect to the designation of representatives, that "[a]pplicable review of this designation is *also* limited and shall be based upon the *substantial evidence* rule." *Id.* at 99 (emphasis added).

availability of judicial review would prevent arbitrary designations, the House of Representatives initially voted to delete the designation provision from the bill altogether out of fear that the Statute would be unfairly applied.[6] The Senate bill, which was ultimately enacted, restored the terrorist organization designation provision, subject to judicial review.[7]

This Court has always stressed that the "substantial evidence" standard of review in the APA forbids federal judicial "rubber-stamping" of agency decisions. Indeed, last Term, in discussing Justice Frankfurter's famous *Universal Camera* decision regarding the scope of "substantial evidence" review, this Court stated that "the Court has stressed the importance of not simply rubber-stamping agency factfinding." *Dickinson v. Zurko*, 119 S. Ct. 1816, 1823 (1999). *See also Universal Camera*, 340 U.S. at 490 ("reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function" when enforcing the substantial-evidence-as-a-whole requirement).

Proper application of the Statute's "substantial support" review standard requires that the lower court take responsibility for *independent* judicial assessment of the

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[6] *See* 142 CONG. REC. H2169 (remarks of Congressman Hyde) (judicial review available to prevent arbitrary designations); *id.* at H2170 (remarks of Congressman Barr) ("great concern" that bill gives executive branch "unilateral plenary authority to declare some group they do not like a terrorist organization."); *id.* at H2175 (remarks of Congressman Watts) (describing, *inter alia*, the organization designation provision as "undermin[ing] our civil liberties"); *id.* at H2175-76 (designation provision deleted from the bill).

[7] The Statute as originally enacted included the "arbitrary and capricious" standard of review. *See* P.L. 104-132, § 302, 110 Stat. 1214, 1249 (1996). Within six months, Congress amended the statute to add back the judicial review provision based on "substantial support in the administrative record taken as a whole." *See* P.L. 104-208, 110 Stat. 3009-644 (1997).

Secretary's administrative record. Such an assessment at least requires a reviewing court to find that the Secretary concluded, based upon substantial support in the record, that the information on which the designation is based was reliable and came from credible sources. In *Richardson v. Perales*, 402 U.S. 389, 402-03 (1971), this Court held that written medical reports, despite their hearsay character, may constitute substantial evidence because of factors that the Court concluded "assure underlying reliability and probative value." This Court would never have embraced such reports as "substantial evidence" to support an agency finding if the record showed that "we have no way of judging" "the quality of the information in the reports." *See* Pet. App. A at 15a. As the Court stated in *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 230 (1938), "mere uncorroborated hearsay or rumor does not constitute substantial evidence."

Similarly, the "substantial evidence" standard requires that the reviewing court search beyond the face of the record, and consider the "consistency and inherent probability" of the information in the administrative record. *Universal Camera*, 340 U.S. at 496. *See also Allentown Mack Sales and Services, Inc. v. NLRB*, 118 S. Ct. 818, 827-29 (1998) (holding that agency fact adjudication under the substantial evidence rule "is subject to the requirement of reasoned decisionmaking" and agencies are "not free to prescribe what inferences from the evidence [they] will accept or reject, but must draw all inferences that the evidence fairly demands").

This Court has held that the APA's "arbitrary and capricious" standard – which is *less stringent* than the "substantial evidence" standard[8] – requires that an agency's decision be subjected to "a thorough, probing in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). The decision below would not

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[8] *American Paper Institute v. American Elec. Power Service Corp.*, 461 U.S. 402, 413 n.7 (1983).

qualify even on this lesser standard of review. Yet the Statute was amended by Congress to *add* the "substantial support" standard to a provision already containing the "arbitrary and capricious" standard. *See supra*, n.7.

In yet another respect, the lower court's decision disregards the statutory judicial review standard. The lower court ruled that a single alleged incident of terrorist activity in 1972 would qualify as "substantial support" for the Secretary's 1997 designation – *i.e.*, 25 years after the alleged incident. Pet. App. A at 5a-6a, 15a. Yet the Statute clearly requires that the Secretary find that the organization "*is*" a terrorist organization that "*engages*" in terrorist activity, not that it *was* an organization that *engaged* in such activity 25 years ago. Also, judicial review of the support for the finding must be based on "the administrative record taken as a whole." 8 U.S.C. § 1189(b)(3)(D). This Court's *Universal Camera* decision teaches that one of Congress' fundamental statutory purposes in creating the "record taken as a whole" requirement for "substantial evidence" judicial review was to *stop* reviewing courts from doing exactly what was done in this case: plucking out isolated portions of the record and proclaiming these portions alone to qualify as "substantial evidence." *Universal Camera*, 340 U.S. at 487-88.[9]

Conscientious judicial application of the substantial support standard is especially important because the Statute dispenses with every significant element of procedural due process at the administrative level, which normally accompanies the types of administrative adjudications for

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[9] The legislative history for a predecessor bill to Section 1189 shows that the drafter intended to require courts, when reviewing a terrorist organization designation, to "find substantial reason when taking the record as a whole" in order "to avoid relying on a shred of evidence when the weight of proof is on the other side." *House Markup Of the Comprehensive Antiterrorism Act of 1995, H.Res. 1710*, FDCH Congressional Hearing Summaries (June 20, 1995).

which substantial evidence review is provided. The administrative record consists entirely of material "of the sort that would normally [not] be received in court." Pet. App. A at 3a. Moreover, there is no opportunity, either pre-deprivation or post-deprivation, for any testing of the credibility of record sources or placing any contrary evidence in the record. The lower court's construction of the statute thus "raises serious constitutional difficulties," when the statute "can and should be read to avoid these difficulties." *Coit Independence Joint Venture v. FLSC*, 489 U.S. 561, 579 (1984).

This Court's procedural due process cases make plain that this type of governmental action risks an erroneous decision. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 97 (1972). That risk is uniquely heightened here because the entire statutory decisionmaking process is controlled, from beginning to end, by the Nation's two political branches,[10] and can be initiated for purely political reasons. *Cf. Allentown Mack Sales and Services, Inc.*, 118 S. Ct. at 828 ("An agency should not be able to impede judicial review, and indeed even political oversight, by disguising its policy making as factfinding"). Therefore, the *only* non-political procedural protection against an erroneous decision is the statutory standard for judicial review. This Court's intervention is essential to ensure that "substantial support" review is undertaken by the D.C. Circuit in a manner consistent with this Court's Article III and APA precedents.

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[10] The Secretary's decisions to "designate," "redesignate," and "revoke" any designation made are all subject to advance notification of Congress, and revocation by Congress. *See* 8 U.S.C. § 1189(a)(2); *id.*, § 1189(a)(4)(B) (redesignation); *id.* § 1189(a)(5) (revocation by act of Congress); § 1189(a)(6) (revocation by Secretary based on change in circumstances).

II. THE D.C. CIRCUIT'S MEASURE FOR "PRESENCE IN THE UNITED STATES" IS INCONSISTENT WITH THIS COURT'S CASES

The D.C. Circuit's rejection of all of the PMOI's constitutional claims rested solely on its holding that the PMOI was not "present" in the United States for constitutional purposes. This holding, in turn, rested on a standard for determining presence that is wholly inconsistent with the guiding principles of this Court's decisions. The issue is of paramount significance to the proper administration of this important Statute. The legal criterion used by the D.C. Circuit to resolve the question of "presence in the United States" excludes from constitutional protection any organization with *both* domestic and foreign ties, as long as its foreign contacts are more prominent than its contacts with the United States. Under this standard, organizations with offices, personnel and property in the United States, which conduct substantial organizational activities here, will be subject to the draconian consequences of the Statute, with no possibility of obtaining judicial relief against constitutional violations in the course of the Secretary's designation process.

The lower court held that PMOI has "no presence "in the United States solely because its "status as foreign is uncontested." Pet. App. A at 10a. The court accepted the government's invitation to deny all constitutional protections to the PMOI based upon the simple fact that "petitioner expressly concedes that the Secretary properly found that it is a foreign organization" under Section 1189. Brief of the United States at 24.

The State Department's determination that an organization is "foreign" under Section 1189 does not depend upon a lack of presence in the United States. Although neither the term "foreign" nor the term "foreign organization" is defined in the statute, the administrative

record reveals the factors the State Department uses to determine whether an organization is foreign:

> (1) some significant leaders of the organization are located or reside primarily outside the United States; (2) headquarters or significant offices, facilities or training camps are located outside the United States; (3) conferences, congresses, or other significant meetings are held outside the United States; (4) aspects of the organization's non-terrorist activities are directed or controlled by members or leaders of the organizations who are not citizens of the United States . . . (5) aspects of the organization's terrorist activities in the United States or abroad are directed or controlled by members or leaders of the organization who are located or reside primarily outside the United States; (6) funding or other material support of the organization . . . comes from outside the United States . . . ; or (7) some of the organization's terrorist activities take place outside the United States.

Administrative Record, Item 3 at p. 3. The government's brief in the D.C. Circuit confirmed that the State Department applied these factors in this case: "the State Department established that the [PMOI] is a foreign organization because its headquarters are in Iraq, its leadership is located primarily outside of the United States, it receives the bulk of its funding and its equipment from outside the United States and much of its terrorist activity has occurred outside of the United States." Brief of the United States at 6. Under the State Department's definition, an organization whose headquarters and principal operations are abroad will be designated as foreign, even if it also has a prominent presence in the United States.

The D.C. Circuit's conclusion concerning constitutional presence depended exclusively on the PMOI's "concession"

that it is a foreign organization under the statute. The court nowhere discussed the ample evidence of the PMOI's presence in the United States. It was undisputed that PMOI has a press office with an address in the National Press Building in Washington D.C. Both parties agreed that since 1987, the PMOI Press Office has been registered as a foreign agent with the Department of Justice under the Foreign Agents Registration Act and has filed biannual reports under that Act. After the D.C. Circuit held that the PMOI had no presence in the United States, the PMOI submitted further information in its Petition for Rehearing detailing a continuous stream of activities in the United States from 1987 to the present, all of which were sponsored by the PMOI and implemented by its Press Office. The PMOI also introduced into the record evidence that its representatives have met with government officials in Washington, D.C. *E.g. Hearing and Markup of H. Res. 122 and H.J. Res. 216. Before the Subcommittee on Europe and the Middle East*, 100th Cong., 1st Sess. (April 21, 1987) (Assistant Secretary of State testifies "We have met with the Mojahedin organization here in Washington").

Even the State Department's own "administrative record" is replete with assertions that the PMOI has offices and activities in the United States. *See* Public Administrative Record, Item 3 at 16 ("The [PMOI] is a foreign organization because, although it does have offices and local chapters *in the United States*, its major leaders and most of its significant offices are located outside the United States"); *id.*, MEK 1 at 15 ("the Mojahedin must register a record of their public activities *in the United States* with the Department of Justice"); *id.* ("the organization also transmits unsolicited faxes and mail of its publications to various U.S. government offices, including the State Department, on a regular basis"); *id*, MEK 10 at CRS-7 ("The PMOI is well organized and has local chapters in virtually every state in the United States . . . . With offices throughout Western Europe and the rest of

North America . . . it frequently conducts anti-regime marches and demonstrations *in those countries*); *id.* at CRS-10 ("PMOI literature frequently cites the group's meeting with Members [of Congress]" on Capitol Hill) (all emphases added).

The principal precedent cited by the D.C. Circuit for its "no constitutional presence" holding, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (cited at Pet. App. A. at 10a) does not support its holding that PMOI is not present in the United States. In *Verdugo-Urquidez*, this Court acknowledged a long line of authority holding that aliens *do* "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Id.* at 270-71 (citing, *e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law")). The Court in *Verdugo-Urquidez* refused to extend this protection to a Mexican citizen who sought to invoke the Fourth Amendment's exclusionary rule to prevent introduction into evidence at his trial evidence seized in a search of his residence abroad. The defendant's only connection to the United States resulted from forcible transport to a U.S. jail after his arrest abroad. In finding that alien "had no previous significant voluntary connection with the United States," the Court distinguished illegal aliens who "were in the United States voluntarily and presumably had accepted some societal obligations." 494 U.S. at 273. The State Department's administrative record in this case would appear to establish that PMOI was in the United States *both voluntarily and lawfully* at the time of the designation, and, for a period of at least ten years before that, had accepted such societal obligations as regularly reporting to the Department of Justice on its extensive and regular contacts and activities in the United States. The D.C. Circuit's decision twisted beyond recognition the measurement of

constitutional presence set forth in *Verdugo-Urquidez* and supplanted it with a new standard that is irreconcilable with that decision.

The D.C. Circuit's decision poses much greater systemic problems in the administration of this Statute than a simple misapplication of *Verdugo-Urquidez* to the facts of this case would pose. First, it collides with case law from this Court recognizing that foreign organizations may rely on the Fifth Amendment of the Constitution to challenge actions of the federal government that affect their interest in property located in this country. *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931). In that case, a Russian corporation became the assignee of certain shipping contracts in the United States, which the United States requisitioned by virtue of its eminent domain power. The Court permitted the corporation to maintain its lawsuit under the Takings Clause of the Fifth Amendment, holding that because the petitioner lawfully acquired and held the property in question, it was entitled to Fifth Amendment protections. *Id.* at 489. In this case, there is no dispute that one effect of the Secretary's order is to enable the government to freeze any financial assets in this country in which the organization has an interest. There is also no dispute that the PMOI has, since 1987, operated an office in Washington, D.C.

Second, the decision is in tension with cases permitting aliens to assert due process violations based upon deprivations of procedural hearing or trial rights, *Wong Wing v. United States*, 163 U.S. 228 (1896); *Jean v. Nelson*, 472 U.S. 846, 872-76 (1985) (Marshall, J. dissenting) (citing *United States v. Henry*, 604 F.2d 908, 912-13 (5th Cir. 1979); *United States v. Casimiro-Benitez*, 533 F.2d 1121 (9th Cir. 1976)). In *Verdugo-Urquidez*, this Court expressly distinguished these cases from cases (such as *Verdugo-Urquidez* itself) involving constitutional violations that occur prior to trial outside of the United States. *See Verdugo Urquidez*, 489 U.S. at 264. The PMOI asserted deprivations

of Due Process in the administrative process and in its inability to review the record before the Court of Appeals or to submit its own evidence to refute unsubstantiated allegations therein. These constitutional violations are analogous to the deprivation of trial rights that this Court has recognized that aliens possess in U.S. courts.

Third, the D.C. Circuit's decision is inconsistent with cases applying the Due Process clause in determining whether American courts have personal jurisdiction over foreign entities. This Court, in establishing the limit of the Due Process Clause as applied to foreign corporations, has measured a corporation's "presence" in the jurisdiction of an American court by evaluating whether the foreign entity has established offices, maintained banking accounts, obtained a license to conduct business, or has actually conducted business in the jurisdiction. *See, e.g. Perkins v. Benguet Mining Co.*, 342 U.S. 437, 444, 445 & 448 (1952). *See also Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 108 (1987) (plurality opinion) (insufficient constitutional contacts where defendant, a Japanese company, "has no offices, agents, employees or property in California, [and] does not solicit business [there]"); *cf. Ruhrgas v. Marathon Oil Co.*, 119 S. Ct. 1563, 1570-72 (1999) (remanding case to consider Due Process challenge to personal jurisdiction asserted by the defendant, a German corporation). This Court has never deprived a foreign organization of the protection of the Due Process Clause in determining personal jurisdiction, even in cases where the headquarters of the entity, its principal leadership and all of its activities occur abroad. *See, e.g., Asahi*, 480 U.S. 102. *See also Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988) ("There has been no question in this country of excepting foreign nationals from the protection of the Due Process Clause"). A threshold test of constitutional presence that treats as irrelevant contacts with the United States such as offices and systematic

activities cannot be reconciled with the approach this Court has taken to measure presence in the personal jurisdiction context.

Fourth, the D.C. Circuit itself has created disparate approaches for measuring constitutional presence under the Foreign Missions Act, 22 U.S.C. §§ 4301 et seq., and Section 1189. In *Palestine Information Office v. Schultz*, 853 F.2d 932 (D.C. Cir. 1988), the D.C. Circuit addressed constitutional challenges brought by the Palestine Information Office, a Washington D.C.-based foreign mission of the Palestine Liberation Organization, when the State Department ordered its office closed. The District Court had dismissed the PIO's claims, stating: "having found that the PIO is a foreign political entity, this Court finds that the PIO has no due process right." *Palestinian Information Office v. Schultz*, 674 F. Supp. 910, 919 (D. D.C. 1987). The Court of Appeals expressly disagreed with this analysis (853 F.2d at 942):

> The district court held that the PIO's rights were not violated because 'a foreign mission *qua* foreign mission cannot have any due process rights. This analysis is, however, circular. The PIO cannot be held to have forfeited its due process rights because it is a foreign mission when that is the very determination it wishes to challenge.

This Court should grant the petition to clarify the appropriate constitutional standard to be applied to determine the issue of "constitutional presence" in the administration of this "procedurally and substantively" "unique" statute. Pet. App. A at 2a. Clarification of this constitutional standard, along with a remand to the D.C. Circuit, is necessary to permit the PMOI to obtain an adjudication on the merits of the substantial constitutional claims it presented to the court below.

A brief discussion of the constitutional issues raised by Petitioner illustrates their seriousness. Petitioner raised due process claims based upon: (1) the statutorily sanctioned lack of notice and opportunity to respond to the Secretary's compilation of an administrative record prior to or after designation; and (2) statutorily compelled judicial review based exclusively upon an *ex parte* record that the Petitioner had no opportunity under the strict terms of the statute and in fact to review, confront or counter with its own evidence. This Court's multiple opinions in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), reveal the grave constitutional issues posed by such a process. In *McGrath*, several organizations were designated as "Communists" without a predesignation hearing, notice that they were to be listed, opportunity to present evidence on their own behalf, or access to the information on which the designations rested. *Id.* at 138 n.11. The organizations filed suit, alleging that the designation violated their due process rights because it impaired their reputations, deterred contributors and fundraisers, injured the organizations' capacity to conduct educational and cultural programs, caused the institution of administrative proceedings against the organizations, prompted members to withdraw from the organizations, and caused the loss of government employment for their members. *Id.* at 128-35.

Four of the justices held that the complaints asserted a cognizable claim under the Due Process Clause of the Constitution. *Id.* at 143 (Black, J., concurring); *id.* at 160-73 (Frankfurter, J., concurring); *id.* at 178 (Douglas, J., concurring); *id.* at 187 (Jackson, J., concurring). A fifth Justice, Justice Burton, declined to reach the constitutional issues in finding that the designation violated the Executive Order, but noted that had the Order permitted such designations "the case would have bristled with constitutional issues." *Id.* at 135. The procedural infirmities of the terrorist designation program challenged below are identical to those

of the communist designation program challenged in *McGrath* and the repercussions of the terrorist designation on affected parties are even more severe.

The PMOI has likewise asserted substantial claims under the First Amendment. It argued below that the designation deprived it of its right to associate with others for the advancement of its belief and ideals. Brief of PMOI at 20 (citing *NAACP v. Button*, 371 U.S. 415, 430 (1963)). The First Amendment protection of an organization's right to associate with putative contributors finds basic support in *McGrath*, 341 U.S. at 158-59 (Frankfurter, J. concurring) and *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976) ("The right to join together 'for the advancement of beliefs and ideas,' is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally effective."). The Ninth Circuit is currently considering an appeal of a decision that addressed First Amendment challenges brought by supporters of organizations designated as foreign terrorists by the State Department. *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176 (C.D. Cal. 1998), *appeal pending*. Even though the district court ultimately denied a preliminary injunction based on First Amendment claims, it recognized that "contribution of funds to further political expression is considered a direct exercise of an individual's freedom of expression and freedom to associate with an organization," *id.* at 1188, and engaged in the searching exercise of evaluating whether the restrictive action taken by the government was no more burdensome than necessary to further the government's interest. *Id.* at 1194-97. Two Justices of this Court have recently affirmed that aliens residing in this country may assert rights under the First Amendment, *Reno v. American-Arab Anti-Discrimination Committee, et al.*, 119 S. Ct. 936, 950 (1999) (Ginsburg, J. concurring), and emphasized that demonstration of a colorable First Amendment claim "would counsel immediate resort to a judicial forum" were a claim of

improper agency action "not cognizable upon judicial review of a final order." *Id.*

Serious constitutional issues presented by the Statute may never be aired if the restrictive, and erroneous, constitutional presence standard of the D.C. Circuit remains in place. Because the D.C. Circuit has exclusive jurisdiction over review of the Secretary's designations under the Statute, and persons other than affected organizations cannot challenge the designations collaterally, *see* 8 U.S.C. §1189(a)(8), this Court is the only forum available to correct the roadblock the D.C. Circuit has erected to prevent any review of these claims.

III. THE ISSUES ARE IMPORTANT

A. The Importance of the Article III Constitutional Issue – The watered-down standard for judicial review applied by the D.C. Circuit will be applied to review future State Department designations of organizations engaged in efforts to resist international law and human rights violations of oppressive governmental regimes. These cases raise vital questions of individual liberty and self-determination, placed under the microscope of international scrutiny by the press and the public. In this factual context, it is especially important that the American federal judiciary not be perceived as a rubber-stamp for this country's political branches.

Real judicial independence is especially essential because the Statute authorizes the judiciary to base its decision in part on classified information never disclosed to the public or the petitioning organization. This extraordinary privilege afforded the government makes all the more critical a firm judicial approach to the reviewing task. *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986), *aff'd by equally divided Court, Reagan v. Abourezk*, 484 U.S. 1 (1987) ("The openness of judicial proceedings serves to preserve both the appearance and reality of fairness in the

adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions.") (citations omitted).

Other aspects of the Statute further heighten the importance of Article III judicial independence. First, the lower court ruled that the Secretary's determination of a national security threat under Section 1189(a)(1)(C) is non-justiciable, because it is a "political judgment." *See* Pet. App. A at 11a-12a. Second, the statute restricts judicial review to the administrative record unilaterally composed by the Secretary of State. 8 U.S.C. § 1189(b)(2). Third, the Congress is given effective veto power over the State Department's designation at every crucial decisionmaking stage under the statute. The political branches are therefore empowered to pick and choose among the multitude of foreign organizations that oppose their own country's repressive governments and select some, for purely political reasons, for designation. *See, e.g.*, Brief of PMOI, Addendum I, attaching Norman Kempster, *U.S. Designates 30 Groups as Terrorists*, L.A. TIMES (October 9, 1997) ("One senior Clinton administration official said inclusion of the [PMOI] was intended as a goodwill gesture to Tehran and its newly elected moderate president, Mohammad Khatami.").

In a decisionmaking environment so thoroughly dominated by the political branches of the Nation's government, it becomes even more important that the federal judiciary make clear that it will not sustain the political branches' "finding" that an organization is engaging in terrorist activity unless it can "conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes," *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Congress itself authorized judicial review of designations as a "conventional judicial function" to impose a check against

lawless conduct by the Nation's political branches. *See id.* at 490. "The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power." *NLRB v. Thompson Products*, 97 F.2d 13, 15 (6th Cir. 1938).

B. The Absence of a Possible Conflict – Because the statute vests subject matter jurisdiction exclusively in the United States Court of Appeals for the District of Columbia Circuit, a traditional "conflict" in circuit court opinions cannot emerge. *See Muncie Gear Works v. Outboard, Marine & Mfg. Co.*, 315 U.S. 759, 765-66 (1942) (granting certiorari rather than waiting for a conflict in the circuits because patent usage is concentrated in one circuit and a conflict is therefore unlikely); *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 50 (1938) (same). The lower court's decision is the first to interpret the basic provisions of this Statute and will bind all future D.C. Circuit panels.

C. The Importance of the Regulatory Interest – Combating worldwide terrorism is obviously high on the agenda of the Nation's political branches. As the lower court's decision recognizes, the Statute in this case is "unique, procedurally and substantively." Pet. App. A at 2a. The Nation's political branches are currently using a statutory framework for pursuing fundamentally important political and social concerns under a constitutionally flawed interpretation of the lower court. This Court needs to spell out appropriate guidelines now for reconciling the roles of the political and judicial branches so that the statute's anti-terrorist objectives can be effectively pursued on a timely basis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

People's Mojahedin Organization of Iran, Petitioner v. United States Department of State and Madeleine K. Albright, Secretary of State, Respondents;

Liberation Tigers of Tamil Eelam, Petitioner v. United States Department of State, Respondent

No. 97-1648, No. 97-1670

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

182 F.3d 17

June 25, 1999, Decided

Jacob A. Stein argued the cause for petitioner in 97-1648. With him on the briefs were George A. Fisher and Ronald G. Precup.

Ramsey Clark argued the cause for petitioner 97-1670. With him on the briefs was Lawrence W. Schilling.

Douglas N. Letter, Litigation Counsel, U.S. Department of Justice, argued the cause for respondents in 97-1648. With him on the brief were Frank W. Hunger, Assistant Attorney General, Wilma A. Lewis, U.S. Attorney, John P. Schnitker and H. Thomas Byron, III, Attorneys, U.S. Department of Justice.

John P. Schnitker, Attorney, U.S. Department of Justice, argued the cause for respondent in 97-1670. With him on the brief were Frank W. Hunger, Assistant Attorney General, Wilma A. Lewis, U.S. Attorney, Douglas N. Letter,

Litigation Counsel, U.S. Department of Justice, and H. Thomas Byron, III, Attorney.

Before: Williams and Randolph, Circuit Judges, and Buckley, Senior Circuit Judge.

On Petitions for Review of Orders of the United States Secretary of State

Randolph, Circuit Judge: The Antiterrorism and Effective Death Penalty Act conferred upon the Secretary of State the power to designate "foreign terrorist organizations." 8 U.S.C. § 1189. By order effective October 8, 1997, Secretary of State Madeline K. Albright so designated the People's Mojahedin Organization of Iran and the Liberation Tigers of Tamil Eelam. *See* Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (1997). Both groups have brought petitions for judicial review of their designations pursuant to 8 U.S.C. § 1189(b)(1).[1]

I

The statute before us is unique, procedurally and substantively. On the basis of an "administrative record," the Secretary of State is to make "findings" that an entity is a foreign organization engaging in terrorist activities that threaten the national security of the United States. *See* 8 U.S.C. § 1189(a)(2)(A)(i), (3)(A). This language--"findings" on an "administrative record"--is commonplace. We encounter it day in and day out in cases coming from federal agencies. But unlike the run-of-the-mill administrative proceeding, here there is no adversary hearing, no presentation of what courts and agencies think of as

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[1] Because these separate petitions involve the same statute and similar claims, we decide both in a single opinion.

evidence, no advance notice to the entity affected by the Secretary's internal deliberations. When the Secretary announces the designation, through publication in the Federal Register, the organization's bank accounts in the United States become subject to seizure and anyone who knowingly contributes financial support to the named entity becomes subject to criminal prosecution. *See* 8 U.S.C. §§ 1189(a)(2)(C), 2339B(a)(1). Any classified information on which the Secretary relied in bringing about these consequences may continue to remain secret, except from certain members of Congress and this court. *See* 8 U.S.C. § 1189(a)(2)(A)(i), (b)(2). There is a provision for "judicial review" confined to the material the Secretary assembled before publishing the designation. *See* 8 U.S.C. § 1189(b)(2). Because nothing in the legislation restricts the Secretary from acting on the basis of third hand accounts, press stories, material on the Internet or other hearsay regarding the organization's activities, the "administrative record" may consist of little else.

We will give the details of the governing provisions in a moment. At this point in a judicial opinion, appellate courts often lay out the "facts." We will not, cannot, do so in these cases. What follows in the next two subsections may or may not be facts. The information recited is certainly not evidence of the sort that would normally be received in court. It is instead material the Secretary of State compiled as a record, from sources named and unnamed, the accuracy of which we have no way of evaluating.

A

"The Liberation Tigers of Tamil Eelam was founded in 1976 for the purpose of creating a separate Tamil state in Sri Lanka. The group began its war against the Government of Sri Lanka in 1983 and has employed violent means, including bombings and political assassination, to achieve

the goal of a separate entity in the North and East of the country. Some 50,000 people are estimated to have died in fourteen years of fighting."[2] "Sri Lankan military and intelligence sources that have reported reliably in the past have identified the Ellalan Force as another alias for the Liberation Tigers of Tamil Eelam," which "will hereafter be referred to as the 'LTTE'." "Headquartered in the Jaffna Peninsula [of Sri Lanka], ... Velupillai Prabhakaran," "the founder and leader of Sri Lanka's LTTE ... organized the insurgency group to pursue an independent homeland for Tamils in Sri Lanka's northern and eastern regions out of frustration over the ethnic discrimination of the Sri Lankan government, according to press reports." "Tamils ... are the mainstay of his organization, according to US military officials."

A February 1995 news story from Hong Kong stated: "Sri Lanka's Tamil Tiger rebels denied plans to assassinate President Chandrika Kumaratunga but tacitly admitted having killed former Indian Premier Rajiv Gandhi, press reports here said Tuesday.... Tigers have also been accused of killing Sri Lankan President Ranasinghe Premadasa in May 1993 and opposition leader Gamini Dissanayake in October last year. However, Tigers have denied all these killings." "The LTTE tried to assassinate leaders of the Tamil Eelam Liberation Organization (TELO)--a Tamil political party--on August 26 [1996]. The President of the party escaped, but a district leader was killed." A report dated July 1996 stated: "A suicide bomb attack by the Liberation Tigers of Tamil Eelam ... narrowly missed killing a key [cabinet minister] and left 25 dead...." A State Department report on terrorist activity in 1996 reported that: "The LTTE has refrained from targeting Western tourists, but a front group--

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[2] All quotations in this part A are from the public version of the administrative record.

the Ellalan Force--continued to send threatening letters to Western missions and the press."

"The LTTE ... uses its international contacts to procure weapons, communications, and bomb-making equipment. The LTTE exploits large Tamil communities in North America, Europe, and Asia to obtain funds and supplies for its fighters in Sri Lanka."

B

A CIA Intelligence Research Paper, dated July 1993, reports that the People's Mojahedin Organization of Iran--the MEK, for short--"is the largest and most active Iranian dissident group. Its primary goal is the overthrow of the Iranian Government, after which it would seek to establish a nontheocratic republic.... The MEK's history, marked by violence and terrorism, belies its claim to uphold democratic ideals. Formed in the early 1960s, its origins reflect both Marxist and Islamic influences, and its history is studded with anti-Western activity."[3]

The MEK "collaborated with Ayatollah Khomeini to overthrow the former Shah of Iran. As part of that struggle, they assassinated at least six American citizens, supported the takeover of the U.S. embassy, and opposed the release of American hostages." "[In 1972] the MEK exploded time bombs at more than a dozen sites throughout Tehran, including the Iran-American Society, ... and the offices of Pepsi Cola and General Motors. From 1972-75 ... the

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[3] According to 62 Fed. Reg. at 52,650, the People's Mojahedin Organization of Iran is also known as the Mujahedin-e Khalq, the MEK, the MKO, the PMOI, the Organization of the People's Holy Warriors of Iran and the Sazeman-e Mujahedin-e Khalq-e Iran.

Mojahedin continued their campaign of bombings, damaging such targets as the offices of Pan-American Airlines, Shell Oil Company, and British organizations." "The MEK has been unable since the mid-1980s to mount terrorist operations inside Iran on the same scale as its earlier activities because of government repression and the group's lack of popular support." "In June 1987 the MEK formed a military wing, the National Liberation Army of Iran (NLA), which is located in eastern Iraq along the central Iran-Iraq border area." "In April 1992, the MEK used its sympathizers in the United States, Canada, Germany, France, the United Kingdom, Switzerland, the Netherlands, Sweden, Norway, Denmark and Australia to launch virtually simultaneous attacks on Iranian embassies and installations." In March 1994 Reuters and the BBC reported that the MEK "said its fighters attacked and disabled 14 oil pipelines in the north of Khuzistan province during military operations" and took credit for "25 other ... attacks it said took place in Iran between March 8 and March 18."

"The MEK looks to expatriate Iranians who are not members of the organization for financial support and manpower." "Baghdad is the MEK's primary supporter and closest ally." "The MEK has offices and members throughout Europe, North America, the Middle East and in Australia. These offices are responsible for collecting donations from private citizens—especially Iranian expatriates--for the MEK and for organizing activities such as demonstrations to show support for the MEK."

C

Section 1189(a)(1), as added by the Antiterrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, § 302, 110 Stat. 1214, 1248, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 356, 110 Stat. 3009, 3009-644,

empowers the Secretary of State to designate a "foreign terrorist organization" if the Secretary finds three things: "(A) the organization is a foreign organization"; "(B) the organization engages in terrorist activity" as defined in the provisions set forth in the margin;[4] and "(C) the terrorist

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[4] Terrorist activity is defined as any activity which is:

> unlawful ... where it is committed (or which, if committed in the United States, would be unlawful under [state or federal law]), and which involves any of the following:
>
> (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
>
> (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
>
> (III) A violent attack upon an internationally protected person ... or upon the liberty of such a person.
>
> (IV) An assassination.
>
> (V) The use of any--
>
> (a) biological agent, chemical agent, or nuclear weapon or device, or
>
> (b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
>
> (VI) A threat, attempt, or conspiracy to do any of the foregoing.

activity of the organization threatens the security of United States nationals or the national security of the United States." Such activities threaten the "national security" when they threaten the "national defense, foreign relations, or economic interests of the United States." *See* 8 U.S.C. § 1189(c)(2).[5] Upon notification that the Secretary plans to designate an organization, the Secretary of the Treasury may require U.S. financial institutions that possess or control assets of that organization to block all financial transactions involving those assets until further directive from him, by Act of Congress or order of a court. *See* 8 U.S.C. § 1189(a)(2)(C).

The knowing provision of material support or resources to a designated organization is a crime punishable by a fine or up to ten years imprisonment, or both. *See* 18 U.S.C. § 2339B(a)(1). Alien members or representatives of designated organizations may not be admitted to the United States. *See* 8 U.S.C. § 1182(a)(3)(B)(i)(IV), (V).

Also, 8 U.S.C. § 1189(a)(8) states that "if a designation under this subsection has become effective under paragraph (1)(B), a defendant in a criminal action shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing." (This last provision seems to contain a miscitation. Paragraph (1)(B) does not deal with a designation's becoming effective; (1)(B) is the paragraph requiring a finding of terrorist activity. It appears that § 1189(a)(8) meant to refer to paragraph (2)(B).)

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8 U.S.C. § 1182(a)(3)(B)(ii).

[5] The statute requires the Secretary to notify certain members of the House and Senate before making a designation, but she need not notify the organizations being considered for designation, nor give them an opportunity to be heard. See 8 U.S.C. § 1189(a)(2)(A).

The judicial review provision states that a designated organization may, within 30 days of publication in the Federal Register, file a petition for judicial review in the United States Court of Appeals for the District of Columbia Circuit. 8 U.S.C. § 1189(b)(1). The court is to look only at the "administrative record" the Secretary has assembled, although "the Government may submit, for ex parte and in camera review, classified information used in making the designation." *See* 8 U.S.C. § 1189(b)(2).

In APA-like language, § 1189(b)(3) provides that the court shall "hold unlawful and set aside a designation the court finds to be" "arbitrary, capricious, an abuse of discretion," "contrary to constitutional right, power, privilege or immunity," "in excess of statutory jurisdiction, authority or limitation," "lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court" or a designation that was not made "in accordance with the procedures required by law." 8 U.S.C. § 1189(b)(3).

II

These cases bear some resemblance to *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 95 L. Ed. 817, 71 S. Ct. 624 (1951), in which the Attorney General, purportedly acting pursuant to an Executive Order, designated certain organizations as Communist on a list furnished to the Civil Service Commission. No majority opinion emerged, but in separate opinions Justices Black (*id.* at 143), Frankfurter (*id.* at 173), Douglas (*id.* at 176) and Jackson (*id.* at 186-87) stated that the Fifth Amendment's due process clause barred the government from so condemning organizations without giving them notice and opportunity to be heard. In view of Joint Anti-Fascist Refugee Committee, and other authorities, the LTTE and the MEK suppose that § 1189 deprived them of due process of

law, particularly since the Secretary's designations had the effect of making it a crime to donate money to them. *Compare Paul v. Davis,* 424 U.S. 693, 704-05, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976).

We put to one side situations in which an organization's bank deposits were seized as a result of the Secretary's designation. Neither the LTTE or the MEK suffered that fate, presumably because no United States financial institutions held any of their property. From all that appears, the LTTE and the MEK have no presence in the United States. Their status as foreign is uncontested. This serves to distinguish them from the organizations named as Communist in the Joint Anti-Fascist Refugee case. Those were domestic entities. A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise. "Aliens receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country." *United States v. Verdugo-Urquidez,* 494 U.S. 259, 271, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990).[6] No one would suppose that a foreign nation had a due process right to notice and a hearing before the Executive imposed an embargo on it for the purpose of coercing a change in policy. *See Regan v. Wald,* 468 U.S. 222, 82 L. Ed. 2d 171, 104 S. Ct. 3026 (1984).

Whatever rights the LTTE and the MEK enjoy in regard to these cases are therefore statutory rights only. Because Congress so allowed, the LTTE and the MEK are entitled to contest their designations on the grounds set forth in

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[6] Because the issue is not before us, we do not decide whether s 1189 deprives those in the United States of some constitutional right if they are members of, or wish to donate money to, an organization designated by the Secretary.

§ 1189(b)(3). Under the statute, they may for instance seek our judgment about whether the Secretary followed statutory procedures, or whether she made the requisite findings, or whether the record she assembled substantially supports her findings.

But even this puts the matter too broadly, the government tells us. Of the three findings mandated by § 1189(a)(1), the third--"(C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States"--is nonjusticiable. *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 92 L. Ed. 568, 68 S. Ct. 431 (1948), holds that it is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch. These are political judgments, "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibilities and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." 333 U.S. at 111, 68 S. Ct. 431. *See, e.g., Haig v. Agee*, 453 U.S. 280, 292, 69 L. Ed. 2d 640, 101 S. Ct. 2766 (1981).

May we nevertheless conduct judicial review limited to determining whether the Secretary complied with the remaining portions of § 1189(a)? The question arises because it is the Secretary's designation that we are supposed to review according to 8 U.S.C. § 1189(b)(1): "Not later than 30 days after publication of the designation in the Federal Register, an organization designated as a foreign terrorist organization may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit." If we are not competent to pass upon the Secretary's national security finding under § 1189(a)(1)(C), and we interpret *Waterman* to hold that we are not, how can we perform the function Congress assigned to us, which is to

pass upon the validity of the designation?[7] For all we know, the designation may be improper because the Secretary's judgment that the organization threatens our national security is completely irrational, and devoid of any support. Or her finding about national security may be exactly correct. We are forbidden from saying. That we cannot pronounce on the question does not mean that we must assume the Secretary was right. It means we cannot make any assumption, one way or the other.

So the question remains: may we perform the checking function of judicial review by ignoring (C) and just pronouncing on (A) and (B)? Waterman has some bearing on the issue. There the Civil Aeronautics Board issued a proposed order disposing of 29 applications from 15 United States carriers to engage in overseas operations. *See Waterman*, 333 U.S. at 116 n.5. Pursuant to statute, such CAB orders (regardless whether the order granted or denied the application) had to be approved by the President before becoming final. In *Waterman* the President approved the CAB's consolidated order. This had the effect of granting Chicago & Southern's application and denying Waterman's. *See id.* at 104-05. The statute contained a provision allowing for judicial review of such CAB orders (although not orders granting or denying routes to foreign carriers). The court of appeals believed that it "could not review such provisions of

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[7] In cases on appeal from the district court, we are to review "judgments, not opinions." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Orders issued by agencies are treated differently. In administrative law, we do not sustain a "right-result, wrong-reason" decision of an agency. We send the case back to the agency so that it may fix its reasoning or change its result. *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 87 L. Ed. 626, 63 S. Ct. 454 (1942), explains the difference.

the order as resulted from Presidential direction," *see id.* at 111, and as we have said, the Supreme Court majority (and the dissenters too) agreed. But the Court disagreed with the court of appeals that it could nevertheless review whatever portion of the CAB's order had not resulted from the President's foreign policy judgment. (On this point the Court divided 5-4.) The Court viewed the CAB orders as merely advisory until the President acted. After the President acted, even if he changed nothing the CAB had decided, "the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate." *See id.* at 114.

One might suppose that, by analogy, the Secretary's designations also "embody ... discretion as to political matters beyond the competence of the courts to adjudicate." *See id.* But there is a difference between the statutory system in *Waterman* and the statutory system we have before us. Apart from the fact that the President did not need to make any particular findings to approve, modify or reject a proposed CAB order, the order could not be effective without Presidential action. The President's action was not limited to a "mere right of veto." *See id.* at 109. The President could, for instance, set aside CAB orders refusing to authorize air transportation. *See id.* Judicial review of the CAB's action, then, would have amounted to rendering an advisory opinion. 333 U.S. at 113-14. Not so here. If we were to determine that the Secretary failed to comply, or did comply, with § 1189(a)(1)(A) and (B), there would be nothing advisory about our opinion. We would uphold, or set aside, the Secretary's determination on that ground. Judicial review, as thus limited, performs the role Congress intended without thrusting the judiciary into the political realm.

With subsection (C) out of the picture, all that remains to be examined--in view of the arguments the LTTE and the MEK present--is the Secretary's findings that these

organizations are "foreign" and that they "engage[ ] in terrorist activity" (8 U.S.C. § 1189(a)(1)(A) & (B)). The LTTE, but not the MEK, contests whether it is a "foreign organization" within the meaning of the statute. According to the LTTE, it is instead a government. The LTTE assumes a difference between a foreign organization and a foreign government. Only in the definition of terrorist activities is there a hint that Congress meant to draw such a distinction. *See* 8 U.S.C. § 1182(a)(3)(B)(ii)(II). In any event, the United States replies that a court cannot make the determination the LTTE wants because recognizing foreign states is solely entrusted to the political branches, and the United States has not recognized the LTTE. "Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government." *Jones v. United States*, 137 U.S. 202, 212-13, 34 L. Ed. 691, 11 S. Ct. 80 (1890). Here, the Secretary determined that the LTTE was a foreign organization and, in the words of the statute, there is "substantial support" for her finding in the materials she has furnished us as an "administrative record." 8 U.S.C. § 1189(b)(3)(D).[8]

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[8] Section 1189(b)(3), although generally parroting the language of the Administrative Procedure Act, modified the "substantial evidence" standard of 5 U.S.C. § 706(2)(E) to say instead "substantial support." Perhaps this was in recognition of the decision of this court that whenever a statute requires the agency action to be supported by "substantial evidence"--a term of art in administrative law--there must be "some sort of adversary, adjudicative-type procedures" before the agency. *Mobil Oil Corp. v. FPC*, 157 U.S. App. D.C. 235, 483 F.2d 1238, 1259 (D.C. Cir. 1973).

We also believe that the record, as the Secretary has compiled it, not surprisingly contains "substantial support" for her findings that the LTTE and the MEK engage in "terrorist activities" within the meaning of 8 U.S.C. § 1182(a)(3)(B). We have already recounted, above, enough of the record to show that the Secretary had before her information that each of the organizations engaged in bombing and killing in order to further their political agendas. Any one of the incidents attributed to the LTTE and to the MEK would have sufficed under the statute.

We therefore refuse to set aside either designation. In so deciding we are not--in the words of *Mistretta v. United States*, 488 U.S. 361, 407, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989)--allowing the reputation of the Judicial Branch to be "borrowed by the political Branches to cloak their work in the neutral colors of judicial action." We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true. As we wrote earlier, the record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected. As we see it, our only function is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism. Her conclusion might be mistaken, but that depends on the quality of the information in the reports she received--something we have no way of judging.

We have considered and rejected the other arguments petitioners have raised and see no need to burden this opinion with a discussion of them.

The petitions for review are denied.

APPENDIX B

FEDERAL REGISTER
Vol. 62, No. 195

Notices

DEPARTMENT OF STATE

[Public Notice 2612]

Designation of Foreign Terrorist Organizations

Part IV

62 FR 52650

DATE: Wednesday, October 8, 1997

ACTION: Designation of Foreign Terrorist Organizations.

Pursuant to Section 219 of the Immigration and Nationality Act ("INA"), as added by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1248 (1996), and amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996), I hereby designate, effective October 8, 1997, the following organizations as foreign terrorist organizations:

Abu Nidal Organization

also known as the ANO, also known as Black September, also known as Fatah Revolutionary Council, also known as the Arab Revolutionary Council, also known as the Arab Revolutionary Brigades, also known as the Revolutionary Organization of Socialist Muslims

Abu Sayyaf Group

also known as Al Harakat Al Islamiyya

Armed Islamic Group

also known as GIA, also known as Groupement Islamique Arme, also known as AIG, also known as Al-Jama'ah al-Islamiyah al-Musallah

Aum Shinrikyo

also known as Aum Supreme Truth, also known as A.I.C. Sogo Kenkyusho, also known as A.I.C. Comprehensive Research Institute

Democratic Front for the Liberation of Palestine-Hawatmeh Faction

also known as the Democratic Front for the Liberation of Palestine, also known as the DFLP, also known as the Red Star Forces, also known as the Red Star Battalions

Euzkadi Ta Askatasuna

also known as Basque Fatherland and Liberty, also known as ETA

Gama'a al-Islamiyya

also known as the Islamic Group, also known as IG, also known as al-Gama'at, also known as Islamic Gama'at, also known as Egyptian al-Gama'at al-Islamiyya

HAMAS

also known as the Islamic Resistance Movement, also known as Harakat al-Muqawama al-Islamiya, also known as Students of Ayyash, also known as Students of the Engineer, also known as Yahya Ayyash Units, also known as Izz Al-Din Al-Qassim Brigades, also known as Izz Al-Din Al-Qassim Forces, also known as Izz Al-Din Al-Qassim Battalions, also known as Izz al-Din Al Qassam Brigades, also known as Izz al-Din Al Qassam Forces, also known as Izz al-Din Al Qassam Battalions

Harakat ul-Ansar

also known as HUA, also known as al-Hadid, also known as al-Hadith, also known as al-Faran

Hizballah

also known as Party of God, also known as Islamic Jihad, also known as Islamic Jihad Organization, also known as Revolutionary Justice Organization, also known as Organization of the Oppressed on Earth, also known as Islamic Jihad for the Liberation of Palestine, also known as Organization of Right Against Wrong, also known as Ansar Allah, also known as Followers of the Prophet Muhammad

Japanese Red Army

also known as Nippon Sekigun, also known as Nihon Sekigun, also known as the Anti-Imperialist International Brigade, also known as the Holy War Brigade, also known as the Anti-War Democratic Front, also known as the JRA, also known as the AIIB

al-Jihad

also known as Egyptian al-Jihad, also known as Vanguards of Conquest, also known as Vanguards of Victory, also

known as Talai'i al-Fath, also known as Tala'ah al-Fatah, also known as Tala'al al-Fateh, also known as Tala' al-Fateh, also known as Talaah al-Fatah, also known as Tala'al-Fateh, also known as New Jihad, also known as Egyptian Islamic Jihad, also known as Jihad Group

Kach

also known as the Repression of Traitors, also known as Dikuy Bogdim, also known as DOV, also known as the State of Judea, also known as the Committee for the Safety of the Roads, also known as the Sword of David, also known as Judea Police

Kahane Chai

also known as Kahane Lives, also known as the Kfar Tapuah Fund, also known as The Judean Voice

Khmer Rouge

also known as the Party of Democratic Kampuchea, also known as the National Army of Democratic Kampuchea

Kurdistan Workers' Party

also known as the PKK, also known as the Partiya Karkeran Kurdistan

Liberation Tigers of Tamil Eelam

also known as LTTE, also known as Tamil Tigers, also known as Ellalan Force

Manuel Rodriguez Patriotic Front Dissidents

also known as the FPMR/D, also known as the Frente Patriotico Manuel Rodriguez-Autonomos, also known as the FPMR/A, also known as the Manuel Rodriguez Patriotic Front, also known as the Frente Patriotico Manuel Rodriguez, also known as the FPMR

Mujahedin-e Khalq Organization

also known as MEK, also known as MKO, also known as Mujahedin-e Khalq, also known as People's Mujahedin Organization of Iran, also known as PMOI, also known as Organization of the People's Holy Warriors of Iran, also known as Sazeman-e Mujahedin-e Khalq-e Iran

National Liberation Army

also known as the ELN, also known as the Ejercito de Liberacion Nacional

Palestine Islamic Jihad-Shaqaqi Faction

also known as PIJ-Shaqaqi Faction, also known as PIJ, also known as Islamic Jihad in Palestine, also known as Islamic Jihad of Palestine, also known as Abu Ghunaym Squad of the Hizballah Bayt Al-Maqdis

Palestine Liberation Front--Abu Abbas Faction

also known as the Palestine Liberation Front, also known as the PLF, also known as the PLF-Abu Abbas

Popular Front for the Liberation of Palestine

also known as the PFLP, also known as the Red Eagles, also known as the Red Eagle Group, also known as the Red Eagle Gang, also known as the Halhul Gang, also known as the Halhul Squad

Popular Front for the Liberation of Palestine--General Command

also known as PFLP-GC

Revolutionary Armed Forces of Colombia

also known as FARC, also known as Fuerzas Armadas Revolucionarias de Colombia

Revolutionary Organization 17 November

also known as 17 November, also known as Epanastatiki Organosi 17 Noemvri

Revolutionary People's Liberation Party/Front

also known as Devrimci Halk Kurtulus Partisi-Cephesi, also known as the DHKP/C, also known as Devrimci Sol, also known as Revolutionary Left, also known as Dev Sol, also known as Dev Sol Silahli Devrimci Birlikleri, also known as Dev Sol SDB, also known as Dev Sol Armed Revolutionary Units

Revolutionary People's Struggle

also known as Epanastatikos Laikos Agonas, also known as ELA, also known as Revolutionary Popular Struggle, also known as Popular Revolutionary Struggle

Shining Path

also known in Spanish as Sendero Luminoso, also known as SL, also known as the Partido Comunista del Peru en el Sendero Luminoso de Jose Carlos Mariategui (Communist Party of Peru on the Shining Path of Jose Carlos Mariategui),

also known as Partido Comunista del Peru (Communist Party of Peru), also known as PCP, also known as Socorro Popular del Peru (People's Aid of Peru), also known as SPP, also known as Ejercito Guerrillero Popular (People's Guerrilla Army), also known as EGP, also known as Ejercito Popular de Liberacion (People's Liberation Army), also known as the EPL

Tupac Amaru Revolutionary Movement

also known as the Movimiento Revolucionario Tupac Amaru, also known as the MRTA

I further direct that these designations be published in the Federal Register on October 8, 1997, as required by section 219(a)(2)(A)(ii) of the INA.

Dated: October 2, 1997.

Madeleine K. Albright,

Secretary of State.

[FR Doc. 97-27030 Filed 10-7-97; 5:00 pm]

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1648 September Term 1998

People's Mojahedin Organization of Iran
Petitioner

v.

Department of State and Madeline K. Albright,
Secretary of State,
Respondents

BEFORE: Williams and Randolph, Circuit Judges
and Buckley, Senior Circuit Judge

ORDER

Upon consideration of petitioner's petition for rehearing filed August 9, 1999, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT
MARK J. LANGER, Clerk

BY:
Robert A. Bonner
Deputy Clerk

August 27, 1999

APPENDIX D

8 U.S.C. § 1189

Designation of foreign terrorist organization

(a) Designation

(1) In general. The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that—

(A) the organization is a foreign organization;

(B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title); and

(C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.

(2) Procedure

(A) Notice.

Seven days before making a designation under this subsection, the Secretary shall, by classified communication—

(i) notify the Speaker and Minority Leader of the House of Representatives, the President pro tempore, Majority Leader and Minority leader of the Senate, and the members of the relevant committees, in writing, of the intent to designate a foreign organization under this subsection, together with the findings made under paragraph (1) with respect to that organization, and the factual basis therefor; and

(ii) seven days after such notification, publish the designation in the Federal Register.

(B) Effect of designation

(i) For purposes of section 2339B of Title 18, a designation under this subsection shall take effect upon publication under subparagraph (A).

(ii) Any designation under this subsection shall cease to have effect upon an Act of Congress disapproving such designation.

(C) Freezing of assets.

Upon notification under paragraph (2), the Secretary of the Treasury may require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, Act of Congress or order of court.

(3) Record

(A) In general.

In making a designation under this subsection, the Secretary shall create an administrative record.

(B) Classified information.

The Secretary may consider classified information in making a designation under this subsection. Classified information shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex

parte and in camera for purposes of judicial review under subsection (c) of this section.

(4) Period of designation

(A) In general.

Subject to paragraphs (5) and (6), a designation made under this subsection shall be effective for all purposes for a period of 2 years beginning on the effective date of the designation under paragraph (2)(B).

(B) Redesignation.

The Secretary may redesignate a foreign organization as a foreign terrorist organization for an additional 2-year period at the end of the 2-year period referred to in subparagraph (A) (but not sooner than 60 days prior to termination of such period) upon a finding that the relevant circumstances described in paragraph (1) still exist. The procedural requirements of paragraphs (2) and (3) shall apply to a redesignation under this subparagraph.

(5) Revocation by Act of Congress.

The Congress, by an Act of Congress, may block or revoke a designation made under paragraph (1).

(6) Revocation based on change in circumstances

(A) In general.

The Secretary may revoke a designation made under paragraph (1) if the Secretary finds that—

(i) the circumstances that were the basis for the designation have changed in such a

manner as to warrant revocation of the designation; or

(ii)the national security of the United States warrants a revocation of the designation.

(B) Procedure.

The procedural requirements of paragraphs (2) through (4) shall apply to a revocation under this paragraph.

(7) Effect of revocation.

The revocation of a designation under paragraph (5) or (6) shall not affect any action or proceeding based on conduct committed prior to the effect date of such revocation.

(8) Use of designation in trial or hearing.

If a designation under the subsection has become effective under paragraph 1(B), a defendant in a criminal action shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or objection at any trial or hearing.

(b) Judicial review of designation.

(1) In general.

Not later than 30 days after publication of the designation in the Federal Register, an organization designated as a foreign terrorist organization may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit.

(2) Basis of review.

Review under this subsection shall be based solely upon the administrative record, except that the

government may submit, for ex parte and in camera review, classified information used in making the designation.

(3) Scope of review.

The Court shall hold unlawful and set aside a designation the court finds to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege or immunity;

(C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;

(D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under paragraph (2), or

(E) not in accord with the procedures required by law.

(4) Judicial review invoked.

The pendency of an action for judicial review of a designation shall not affect the application of this section, unless the court issues a final order setting aside the designation.

(c) Definitions

As used in this section—

(1) the term "classified information" has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.)

(2) the term "national security" means the national defense, foreign relations, or economic interests of the United States;

(3) the term "relevant committees" means the Committees on the Judiciary, Intelligence, and Foreign Relations of the Senate and the Committees on the Judiciary, intelligence, and International relations of the House of Representatives; and

(4) the term "Secretary" means the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General.

Supreme Court, U.S.
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CLERK

(2)

No. 99-1070

In the Supreme Court of the United States

PEOPLE'S MOJAHEDIN ORGANIZATION OF IRAN,
PETITIONER

v.

DEPARTMENT OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct legal standard in reviewing the Secretary of State's designation of petitioner as a "foreign terrorist organization."

2. Whether the Secretary of State violated the Due Process Clause of the Fifth Amendment by designating petitioner as a "foreign terrorist organization" without giving petitioner prior notice and an opportunity to be heard.

3. Whether the designation of petitioner as a "foreign terrorist organization" resulted in a violation of the First Amendment rights of petitioner and/or its members and supporters.

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PEOPLE'S MOJAHEDIN ORGANIZATION OF IRAN,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 182 F.3d 17. The Department of State's Order of October 2, 1997, entitled Designation of Foreign Terrorist Organizations (Pet. App. 16a-22a), is reported at 62 Fed. Reg. 52,650.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1999. A petition for rehearing was denied on August 27, 1999 (Pet. App. 23a). The Chief Justice granted an extension of time to and including December 25, 1999, for filing a petition for a writ of certiorari, and the petition was filed on December 27, 1999 (a

Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the application of 8 U.S.C. 1189 (Supp. IV 1998), which was enacted by the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 302(a), 110 Stat. 1248. Section 1189 reflects Congress's effort to "prevent persons within the United States, or subject to the jurisdiction of the United States, from providing material support or resources to foreign organizations that engage in terrorist activities." AEDPA § 301(b), 110 Stat. 1247 (statement of congressional purpose); see generally AEDPA § 301(a), 110 Stat. 1247 (congressional findings regarding the threat to the United States posed by terrorism and by financial contributions to terrorist organizations).

Under Section 1189, the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General (see 8 U.S.C. 1189(c)(4) (Supp. IV 1998)),

> is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that—
>
> (A) the organization is a foreign organization
>
> (B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title); and
>
> (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.

8 U.S.C. 1189(a)(1) (Supp. IV 1998). The term "national security" is defined to mean "the national defense, foreign relations, or economic interests of the United States." 8 U.S.C. 1189(c)(2) (Supp. IV 1998). The designation of a "foreign terrorist organization" takes effect when it is published in the *Federal Register*. 8 U.S.C. 1189(a)(2)(A)(ii), 1189(a)(2)(B)(i) (Supp. IV 1998). Seven days before publishing such a notice, the Secretary must inform specified Members of Congress, by classified communication, of her intent to make the designation, as well as the factual basis for the required findings. 8 U.S.C. 1189(a)(2)(A)(i) (Supp. IV 1998).

Three consequences follow from the designation of an organization as a "foreign terrorist organization." First, if any financial institution becomes aware that it possesses or controls the funds of such an organization, the institution is required to retain the funds and notify the Secretary of the Treasury of their existence. 18 U.S.C. 2339B(a)(2) (Supp. IV 1998); see also 8 U.S.C. 1189(a)(2)(C) (Supp. IV 1998) (authorizing the Secretary of the Treasury to issue a blocking order at the time that Congress is notified of the impending designation). Second, alien representatives of the organization, as well as alien members who know or should have known that the organization is a foreign terrorist organization, may not be admitted to the United States. 8 U.S.C. 1182(a)(3)(B)(i)(IV) and (V) (Supp. IV 1998). Finally, any United States person who knowingly provides "material support or resources" to the organization will be guilty of a criminal offense. 18 U.S.C. 2339B(a)(1) (Supp. IV 1998).

In making a designation, the Secretary is required to create an administrative record. 8 U.S.C. 1189(a)(3)(A) (Supp. IV 1998). The Secretary may also consider classified information. 8 U.S.C. 1189(a)(3)(B) (Supp. IV

1998). An organization designated as a foreign terrorist organization may obtain judicial review of the Secretary's designation in the United States Court of Appeals for the District of Columbia Circuit. 8 U.S.C. 1189(b)(1) (Supp. IV 1998). The court's review is "based solely upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information used in making the designation." 8 U.S.C. 1189(b)(2) (Supp. IV 1998). The court of appeals "shall hold unlawful and set aside a designation" (8 U.S.C. 1189(b)(3) (Supp. IV 1998)) if the court finds it to be (*inter alia*) "lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court." 8 U.S.C. 1189(b)(3)(D) (Supp. IV 1998).

2. In October 1997, the Secretary published a notice in the *Federal Register* designating 30 "foreign terrorist organizations" pursuant to Section 1189. Pet. App. 16a-22a. This case involves a petition for judicial review filed by petitioner People's Mojahedin Organization of Iran, also known as the Mujahedin-e Khalq (MEK), challenging the Secretary's designation of it as a foreign terrorist organization.[1]

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[1] Another organization designated in the October 1997 *Federal Register* notice, the Liberation Tigers of Tamil Eelam (LTTE), separately petitioned for review in the court of appeals. The court upheld both designations in a single opinion. Pet. App. 2a. The LTTE has not sought review of that judgment in this Court.

The original designation of petitioner expired by operation of law two years after it took effect. See 8 U.S.C. 1189(a)(4)(A) (Supp. IV 1998). On October 8, 1999, petitioner was redesignated as a "foreign terrorist organization" for an additional two-year period. 64 Fed. Reg. 55,111. Petitioner's challenge to that redesignation is currently pending before the court of appeals. See Pet. 7-8 n.2.

The facts underlying the Secretary's designation of petitioner are set forth in the unclassified Summary of Administrative Record (SAR) filed in the court of appeals, as well as in the court's opinion. Formed in Iran in the 1960s, petitioner's primary goal is the overthrow of the current Iranian government. Pet. App. 5a. Petitioner participated in and supported the takeover of the United States Embassy in Tehran in 1979 and was responsible for the killings of several United States nationals before the takeover. SAR 1-2, 17-19. In the 1970s, petitioner engaged in a campaign of bombings against targets that included the Tehran offices of American corporations. Pet. App. 5a-6a.

Since the revolution in Iran, petitioner "has developed into the largest and most active Iranian dissident group." SAR 1. In 1987, petitioner formed a military wing, the National Liberation Army of Iran (NLA), which is located in eastern Iraq. Pet. App. 6a. Petitioner receives substantial support and assistance, including military training, from the Iraqi regime of Saddam Hussein. SAR 1, 6. Among other terrorist actions, in April 1992 the organization coordinated simultaneous attacks on Iranian embassies and consulates in 13 cities around the world. SAR 15-16; Pet. App. 6a. In 1993, petitioner's members laid mines on Iranian roads and attacked an Iranian telecommunications office, killing two civilian workers. SAR 13. During the same year, petitioner's members shot and killed a Turkish diplomat in Iraq and wounded a Turkish embassy employee. SAR 11-12.

3. The court of appeals upheld the Secretary's designation of petitioner as a foreign terrorist organization. Pet. App. 1a-15a. The court first rejected the contention that Section 1189 violated petitioner's right to due process of law by authorizing the Secretary to

designate it as a foreign terrorist organization without giving petitioner notice or an opportunity to be heard. *Id.* at 9a-10a. The court explained:

> We put to one side situations in which an organization's bank deposits were seized as a result of the Secretary's designation. Neither the LTTE or the MEK suffered that fate, presumably because no United States financial institutions held any of their property. From all that appears, the LTTE and the MEK have no presence in the United States. Their status as foreign is uncontested. * * * A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.

Id. at 10a.

The court of appeals found no basis under the statute for setting aside the Secretary's designation of petitioner as a foreign terrorist organization. Of the three findings required under Section 1189(a)(1), the court held that the third finding—*i.e.*, that "the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States," 8 U.S.C. 1189(a)(1)(C) (Supp. IV 1998) —is not subject to judicial review, because "it is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch." Pet. App. 11a. The court stated that its review was appropriately limited to the first and second findings made by the Secretary, see *id.* at 11a-13a, and that "[j]udicial review, as thus limited, performs the role Congress intended without thrusting the judiciary into the political realm," *id.* at 13a. The court noted that petitioner did not contest the Secretary's finding that it was a "foreign organization" within the meaning of the statute. *Id.* at 14a. The court

of appeals found "substantial support" in the record for the Secretary's second required finding—*i.e.*, that petitioner engages in terrorist activities. *Id.* at 15a. It explained that "the Secretary had before her information that [petitioner] engaged in bombing and killing in order to further [its] political agenda[]." *Ibid.*[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 9-12) that Section 1189, as construed by the court of appeals in this case, violates Article III by forcing the reviewing court to "rubber-stamp" a decision made by the Executive Branch. That claim is incorrect. The court of appeals explained that an organization designated by the Secretary pursuant to Section 1189 may "seek [the court's] judgment about whether the Secretary followed statutory procedures, or whether she made the requisite findings, or whether the record she assembled substantially supports her findings." Pet. App. 11a. The reviewing court in essence asks whether the designation is reasonable in light of the facts as the Secretary understood them—subject to the qualification that the court may not inquire into the reasonableness of the Secretary's finding that the organization's terrorist activity "threatens the security of United States

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[2] Petitioner raised other challenges to the Secretary's designation as well, including the claim (see Pet. C.A. Br. 20-21) that the designation deprived it of rights protected by the First Amendment. The court of appeals rejected those additional claims without discussion. See Pet. App. 15a.

nationals or the national security of the United States." *Ibid.* (quoting 8 U.S.C. 1189(a)(1)(C) (Supp. IV 1998)).

That judicial review under Section 1189 is circumscribed does not mean that the court of appeals in conducting such review has ceased to function as an Article III court. Executive Branch decisions concerning foreign affairs and the treatment of aliens have traditionally been reviewed under highly deferential standards. See, *e.g.*, *Mathews* v. *Diaz*, 426 U.S. 67, 82 (1976) (noting the "narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization"); *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972) ("when the Executive exercises this power [of excluding aliens] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant"). Section 1189, as construed by the court of appeals, is fully in keeping with that tradition. The court of appeals' approach implements Congress's judgment that the Secretary's Section 1189 designations should be subject to some judicial scrutiny, while recognizing the primacy of the Executive Branch in matters involving foreign policy and the treatment of aliens.[3]

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[3] In *Humanitarian Law Project* v. *Reno*, Nos. 98-56062 & 98-56280, 2000 WL 235310, at *5 (9th Cir. Mar. 3, 2000), the court of appeals held that "AEDPA does not grant the Secretary unfettered discretion in designating" foreign terrorist organizations because the law establishes standards that are "sufficiently precise to satisfy constitutional concerns" and provides for judicial review of the Secretary's decision. *Ibid.* The court observed that "the degree of deference accorded to the Secretary's decision" in the

Nothing in this Court's precedents suggests that such a course is in any way inconsistent with the requirements of Article III.[4]

Petitioner also contends (Pet. 10) that the court of appeals' "decision casts off the basic requirements of Article III as outlined in cases discussing judicial review of search and arrest warrants." The cases cited by petitioner (Pet. 10-11) establish that a magistrate, before issuing a search or arrest warrant, must make an independent determination that the requisite probable cause exists. That duty is derived, however, not from the "requirements of Article III," but from the Fourth Amendment and the applicable Federal Rules of Criminal Procedure. See *Giordenello* v. *United States*, 357 U.S. 480, 485-486 (1958); *United States* v. *Ventresca*, 380 U.S. 102, 105-109 (1965).

2. Petitioner contends (Pet. 12-17) that the court of appeals erred by failing to apply the principles that govern "substantial evidence" review under the Administrative Procedure Act (APA). That claim is incorrect. In determining the mode of review appropriate under

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review proceedings "is a necessary concomitant of the foreign affairs power." *Ibid.*

[4] In other spheres as well, this Court has recognized that respect for coordinate Branches requires a narrow scope of judicial review. For example, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Under that standard, "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315. No one would suppose that a court in applying that standard has ceased to function as an Article III tribunal.

Section 1189, the court of appeals correctly took account of the distinctive features of the statutory scheme, including the subject matter of the statute, the manner in which the administrative record is compiled, and the phrasing of the applicable standard of review.

a. As we explain above, Executive Branch determinations regarding foreign affairs and the treatment of aliens are typically reviewed by a court—when they are reviewed at all—under a highly deferential standard. The court of appeals correctly recognized that its approach to review under Section 1189 should take account of the fact that the Secretary's designation of foreign terrorist organizations implicates foreign policy concerns that are traditionally beyond the judicial ken. See Pet. App. 11a, 14a. Indeed, the petition for certiorari does not question the court of appeals' holding that *no* review was available of the Secretary's determination that petitioner's terrorist activity "threatens the security of United States nationals or the national security of the United States." *Id.* at 11a (quoting 8 U.S.C. 1189(a)(1)(C) (Supp. IV 1998)). Similar concerns underlay the court's holding that although it could undertake *some* review of the Secretary's determination that petitioner engages in "terrorist activity," it could not properly attempt to assess "the quality of the information" on which the Secretary relied. *Id.* at 15a.

b. The manner in which a Section 1189 "administrative record" is compiled also affects the nature of subsequent judicial review. In contrast to a typical rulemaking or agency adjudication, the administrative record in a Section 1189 proceeding necessarily is compiled by the government unilaterally, without direct input from the subject organization. 8 U.S.C. 1189(a)(2)

and (a)(3)(A) (Supp. IV 1998).[5] As the court of appeals explained, "nothing in the legislation restricts the Secretary from acting on the basis of third hand accounts, press stories, material on the Internet or other hearsay regarding the organization's activities." Pet. App. 3a. The Secretary may also consider classified information. 8 U.S.C. 1189(a)(3)(B) (Supp. IV 1998). The distinctive manner in which the administrative record is compiled further refutes petitioner's suggestion that APA principles can be mechanically applied to judicial review of the Secretary's designation.

c. The court of appeals' understanding of its role is also supported by the text of Section 1189's judicial review provision. As the court observed (Pet. App. 14a n.8), the applicable standard of review—*i.e.*, whether the Secretary's designation "lack[s] substantial *support* in the administrative record taken as a whole or in classified information submitted to the court," 8 U.S.C. 1189(b)(3)(D) (Supp. IV 1998) (emphasis added)—differs from the "substantial evidence" standard that is "a term of art in administrative law." The court noted

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[5] The SAR in this case describes admissions and claims of responsibility for terrorist attacks made by MEK officials, sometimes in the form of press statements or summaries/transcripts of MEK radio broadcasts. See, *e.g.*, SAR 2, 8, 9, 10, 11, 12, 13, 14, 15. To that extent the government relied on petitioner's self-description in determining that it is a "foreign terrorist organization." The statutory scheme clearly does not envision, however, that an organization will be given notice of a contemplated designation or any opportunity to participate formally in the process by which the designation is made. *Inter alia*, such notice would undermine the effective operation of 18 U.S.C. 2339B(a)(2) (Supp. IV 1998), which freezes funds in which a designated foreign terrorist organization holds an interest, by enabling the organization to remove the funds prior to the designation.

that the change in wording may have reflected Congress's awareness that the "substantial evidence" standard typically implies a requirement of "adversary, adjudicative-type procedures before the agency." Pet. App. 14a n.8 (internal quotation marks omitted). Congress's modification of the familiar term "substantial evidence" reinforces the conclusion that the Secretary, in designating foreign terrorist organizations, may appropriately rely on materials that would not be regarded as admissible evidence in a judicial proceeding. See *id.* at 3a (court of appeals observes that "[t]he information [contained in the SAR] is certainly not evidence of the sort that would normally be received in court"). The Secretary's flexibility to consider such materials would be substantially undermined if the court of appeals applied APA standards of evidentiary reliability in reviewing the Secretary's designation.

d. In the court of appeals, petitioner did not dispute that it employs violent means of obtaining its political objectives. Rather, the thrust of its argument was that its activities could not properly be treated as "terrorist" conduct because it was engaged in legitimate resistance to an illegitimate regime. Thus, petitioner stated that it "maintains an army (the National Liberation Army), and it carries out missions within Iran against military and strategic targets. But if armed resistance to an oppressive regime were illegal, the United States would not be a nation." Pet. C.A. Br. 27. Petitioner further contended that "[t]he statutory defect in respondents' designation of petitioner is the absence of any identified 'foreign relations' being 'threatened' by any of petitioner's activities." *Id.* at 28.

In deciding whether violent foreign organizations should be treated as terrorists, responsible officials in the political Branches must make nuanced assessments

of a variety of moral, practical, and political considerations. Those considerations are essentially irrelevant, however, to the statutory definition of "terrorist activity," which involves an objective inquiry into the presence or absence of specified violent acts. See 8 U.S.C. 1182(a)(3)(B)(ii). Those considerations *are* relevant, however, to the Secretary's ultimate determination whether an organization is a "foreign terrorist organization," because they may be taken into account in determining whether an organization's terrorist activity "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. 1189(a)(1)(C) (Supp. IV 1998). But as we explain above, the court of appeals held that the Secretary's finding under Section 1189(a)(1)(C) is not judicially reviewable (see Pet. App. 11a), and petitioner has not challenged that holding in this Court.

3. Petitioner contends (Pet. 18-27) that its contacts with the United States are sufficient to entitle it to the protections of the Due Process Clause. That claim lacks merit.

a. The court of appeals rested its due process analysis on the proposition that "[a] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." Pet. App. 10a. That statement is correct and consistent with this Court's precedents. The Court's decisions recognizing constitutional protections for aliens "establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country," *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); they do not suggest that an alien having no meaningful ties to the United States may invoke the Due Process Clause.

Contrary to petitioner's assertion (Pet. 19-20), the court of appeals' determination that petitioner lacks Fifth Amendment rights was not based "exclusively on [petitioner's] 'concession' that it is a foreign organization under the statute." Rather, the court considered all the information before it and concluded that "[f]rom all that appears, * * * petitioner ha[s] no presence in the United States." Pet. App. 10a. That understanding of petitioner's minimal connection to the United States is consistent with the statement in petitioner's court of appeals brief that the organization's "official presence in this country is limited to a small press office in the National Press Building here in Washington." Pet. C.A. Br. 5.[6] The court of appeals also inferred that "no United States financial institutions held any of [petitioner's] property," Pet. App. 10a, apparently from the fact that no assets of petitioner had been frozen (*ibid.*) pursuant to 8 U.S.C. 1189(a)(2)(C) (Supp. IV 1998) and/or 18 U.S.C. 2339B(a)(2) (Supp. IV 1998). Thus, based on the record and the arguments presented to it, the court of appeals correctly concluded that petitioner lacked the substantial connections with this country that would typically entitle an alien to invoke the protections of the Constitution.

There is, in particular, no basis for petitioner's contention that the court of appeals' decision "collides with case law from this Court recognizing that foreign organizations may rely on the Fifth Amendment of the

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[6] Petitioner's current arguments (Pet. 20-21) from the SAR regarding the extent of its contacts with the United States were not presented to the court of appeals, and this Court should not consider them in the first instance. Petitioner will have the opportunity to present those arguments in connection with its pending petition for review of the 1999 redesignation of petitioner as a foreign terrorist organization. See Pet. 7-8 n.2.

Constitution to challenge actions of the federal government that affect their interest in property located in this country." Pet. 22 (citing *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931)). In *Russian Volunteer Fleet*, this Court held that a foreign organization whose property in the United States had been expropriated by the federal government could invoke the protections of the Just Compensation Clause of the Fifth Amendment. 282 U.S. at 489. The court of appeals in the instant case specifically reserved judgment on the question whether a designated foreign terrorist organization could assert a due process challenge to the freezing of its funds pursuant to the statute. See Pet. App. 10a ("We put to one side situations in which an organization's bank deposits were seized as a result of the Secretary's designation.").

b. As the court of appeals observed, "[n]o one would suppose that a foreign nation had a due process right to notice and a hearing before the Executive imposed an embargo on it for the purpose of coercing a change in policy." Pet. App. 10a (citing *Regan* v. *Wald*, 468 U.S. 222 (1984)). That would be so, of course, even if the foreign nation maintained an embassy, consulate, or other such presence in the United States. Although petitioner is not a recognized foreign government, it is a foreign entity that (by its own account) is dedicated to the violent overthrow of Iran's current government and conducts both "diplomatic" and "military" activities to achieve that result. See Pet. C.A. Br. 16 n.17, 19. It is headquartered in Iraq, has relations with the Iraqi government, and maintains its own "army." Pet. 19; Pet. C.A. Br. 18, 27, 34. Such an entity cannot plausibly claim an entitlement to due process protections that would limit the ability of Executive Branch officials to conduct United States foreign policy.

c. Even if petitioner could avail itself of constitutional protections, the Due Process Clause is not implicated in this case because the Secretary's designation did not deprive it of any constitutionally cognizable liberty or property interest. See, *e.g.*, *Ingraham* v. *Wright*, 430 U.S. 651, 672 (1977). As we explain above (p. 3, *supra*), designation of an organization pursuant to Section 1189 has three possible consequences: (i) the potential freezing of funds in which the organization has an interest; (ii) restrictions on the admission into the United States of the organization's alien members and representatives; and (iii) a criminal prohibition on the provision of material support to the organization by United States persons.

Petitioner did not suffer any deprivation of liberty or property as a result of the Secretary's designation. (i) Assuming, *arguendo*, that the freezing of assets would effect a deprivation of property, petitioner did not "suffer[] that fate." Pet. App. 10a; see pp. 14-15, *supra*. (ii) Any restriction on the admission of petitioner's alien members or representatives would not effect a deprivation of petitioner's liberty or property, both because the burden would fall on individuals rather than on the organization *qua* organization, and because "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). (iii) Petitioner has failed to identify any deprivation of a cognizable property interest caused by the statutory ban on the provision of material support and resources by United States persons. Moreover, cutting off contributions to petitioner does not deprive it of a cognizable property interest, both because petitioner has no

"legitimate claim of entitlement," *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), to receive financial support from third parties, and because international transactions are in any event always subject to the plenary power of the national government to regulate or prohibit them. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981).

4. Petitioner suggests (Pet. 26-27) that designation of a foreign terrorist organization pursuant to Section 1189 infringes the First Amendment rights of the organization and/or its members and supporters. That claim lacks merit. As a foreign political organization with no substantial presence in this country, petitioner is "unable to claim the protections of the First Amendment." *DKT Memorial Fund Ltd.* v. *AID*, 887 F.2d 275, 284 (D.C. Cir. 1989). In any event, the First Amendment does not prevent Congress from prohibiting the transfer of material resources to foreign organizations found to be engaged in terrorist activity. As the Ninth Circuit recently explained,

> [AEDPA] does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. [Individuals] are even free to praise the groups for using terrorism as a means of achieving their ends. What AEDPA prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives.

Humanitarian Law Project v. *Reno*, Nos. 98-56062 & 98-56280, 2000 WL 235310, at *2 (Mar. 3, 2000).[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2000

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[7] The court of appeals in the instant case stated that "[b]ecause the issue [wa]s not before [it], [it would] not decide whether § 1189 deprives those in the United States of some constitutional right if they are members of, or wish to donate money to, an organization designated by the Secretary." Pet. App. 10a n.6. For the reasons stated by the Ninth Circuit in *Humanitarian Law Project*, the statutory ban on donations of money to designated foreign terrorist organizations does not violate a would-be donor's First Amendment rights. Furthermore, federal law does not prohibit persons within the United States from becoming "members" of such an organization, so long as membership does not entail the provision of material support.

Supreme Court, U.S.
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(3)

No. 99-1070

IN THE
SUPREME COURT OF THE UNITED STATES

THE PEOPLE'S MOJAHEDIN ORGANIZATION OF IRAN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF STATE and
MADELEINE K. ALBRIGHT, Secretary of State,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER

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INTRODUCTION

Our petition argues that the D.C. Circuit's disclaimer of "any ability to evaluate the facts that underlay the agency's decision" to designate a "foreign terrorist organization" amounts to a rubber stamp of the Secretary's designation. Pet. at 7. The government agrees that the D.C. Circuit eschewed any responsibility to evaluate the quality of the information supporting the agency's factfinding, but argues that such abdication is appropriate. Opp. at 10. The government, however, fails to square its concept of "some judicial scrutiny" (*id.* at 8), or "*some* review" (*id.* at 10) with the Statute and Article III. It fares no better in its defense of the standard used to determine constitutional presence. Most tellingly, the government does *not* dispute any of our reasons for asserting that the issues presented are important. *See* Pet. at 27-29. The Petition should therefore be granted.[1]

1. The Judicial Review Standard – The Petition demonstrates that the lower court's judicial review standard is inconsistent with the standard for review of Executive Branch factfinding in such contexts as search and arrest warrants and APA adjudications. The government does not dispute *any* of these inconsistencies. Claiming instead that review of Section 1189 designations should not afford the same protections, it implicitly acknowledges that its concept of "some review" will not provide the designated organization with any *meaningful* judicial review of the Secretary's finding of terrorist activity. It nowhere explains how its position squares with the legislative history that shows Congress adopted § 1189(b)(3), because it wanted to provide a meaningful judicial check against arbitrary

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[1] The government makes intentionally inflammatory allegations in its "Statement," including claims that PMOI "participated" in the embassy takeover and was "responsible" for killing Americans. Opp. at 5. These allegations were hotly contested by PMOI and were not found to be true by the court below. They provide no basis to deny the Petition.

"terrorist" designations. Pet. at 12-14 and 16 n.9. Congress clearly did *not* intend to create "ineffectual" review.[2]

The plain language of the Statute contradicts the government's position. The Statute's review provision tracks the five-tiered structure of the APA judicial review provision. *Compare* 8 U.S.C. § 1189(b)(3), with 5 U.S.C. § 706(2). In this context, the most natural construction of the "substantial support" requirement is that Congress intended to incorporate the type of judicial review exemplified by the APA's "substantial evidence" requirement. Indeed, the legislative history of the statute – which the government does *not* contest – confirms that Congress intended that the stringency of judicial review under each of the "substantial support" and "substantial evidence" standards in substance be equivalent. Pet. at 13 n.5.[3]

PMOI does not contest the government's claim that the Secretary may rely on materials not admissible in a judicial proceeding. Opp. at 12. It argues, however, that such reliance must be accompanied by meaningful indicia of reliability and probative value. Pet. at 15. Police officers, who may also rely on hearsay to make stops, arrests and searches, are still subject to review for reasonableness based

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[2] In *Humanitarian Law Project v. Reno*, No. 98-56062 & 98-56280, 2000 WL 235310 at 5* (March 3, 2000) the Ninth Circuit in dicta stated: "although plaintiffs complain that [§ 1189] review is ineffectual, because of the degree of deference accorded to the Secretary's decision, that is a necessary concomitant of the foreign affairs powers." The government omits the "ineffectual" phrase in its quote. Opp. at 8 n.3.

[3] The government seeks to escape the explicit language of the statute's judicial review provision by seizing on a footnote in the lower court's opinion which only speculated that the Congress substituted the word "support" for "evidence" because the statute does not provide for a formal "adversary adjudicative type procedure." Pet. at 14a, n.8. But the government never explained Congress' explicit choice to *add* the "substantial support" standard, even though the Statute already had the "arbitrary and capricious" standard. Pet. at 14, n.7.

on the reliability of their information. *See* Pet. at 10-11; *cf. Florida v. J.L.*, 2000 WL 309131, – U.S. – (Mar. 28, 2000) (*Terry* stop of juvenile carrying a gun invalid when based solely on anonymous tip). Nothing in the government's brief explains why the Secretary of State, any more than a policeman or an ALJ, should be allowed to take action against alleged terrorist organizations without any independent judicial check on the reliability of the information alleged to support her designation.

Certainly, the government's peculiar argument based on the unilateral and *ex parte* "manner in which a Section 1189 administrative record is compiled" (Opp. at 10) fails to provide any rational basis for the government's position. A policeman's search and arrest record is also compiled unilaterally and *ex parte*; far from justifying ineffectual judicial review, this Court has made clear that those very features of the "record" require judicial scrutiny of the reliability of the information used by the Executive Branch. This point has even more force when applied to the Secretary's "administrative record," given the political context in which it is created. Pet. at 17. Nor does the government provide any support for its contention that the non-justiciability of the national security finding raises "[s]imilar concerns" that somehow justify emasculated review of the factual terrorist activity finding. Opp. at 10.

2. The Article III Rubber-Stamping Issue – The government contends that the lower court merely engaged in "highly deferential" judicial review and did not act as an unconstitutional rubber stamp. Opp. at 8. The government compares its "some review" standard to the "rational basis" test the Court applies to determine the constitutionality of legislative classifications under the Equal Protection Clause. Opp. at 9 n.4 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). The government confuses the Article III judicial role in reviewing Executive Branch adjudicative factfinding with the courts' very different role

in reviewing legislative policy choices. Indeed, the Court has "explicitly rejected use of [the equal protection judicial standard of review] ... in the context of statutory review of agency findings of fact." II K. Davis, Administrative Law Treatise, § 11.4 at 201 (3d ed. 1994); *Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983) (rejecting the "minimum rationality" constitutional test).[4]

Under the Statute, the Secretary's designation must be based on "findings" supported by a "factual basis," 8 U.S.C. § 1189(a)(2)(A)(1), set forth in an "administrative record." *Id.* § 1189(a)(3)(A). The "facts," as "found" by the Secretary, are only as good as the quality of the information in her record. Therefore, it is impossible for the judiciary to make *any* judgment concerning the Secretary's adjudicated "facts" without evaluating the quality of the information on which she relied. Yet the government admits that, under the lower court's construction of the statute, all judicial evaluations of the quality of the information on which the Secretary adjudicated her "facts" *is forbidden*. Opp. at 10.

The government completely ignores this Court's rejection of statutory interpretations that "cast Article III judges in the role of petty functionaries, [] required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 426 (1995). *That is precisely what the Statute does*, as construed by the government and the lower court. The Statute, as thus construed, compels the

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[4] *Mathews v. Diaz*, 426 U.S. 67 (1976) and *Kleindienst v. Mandel*, 408 U.S. 753 (1972), do not support the government's "some review" standard. *Mathews* addresses a legislative classification. In *Kleindienst*, there was no statutory right of judicial review and the Court based its affirmance on a record that included uncontradicted affidavit testimony supporting the alien exclusion at issue. 408 U.S. 769.

federal courts "to enter as a judgment" the Secretary's finding of "terrorist activity," but strips them of any "capacity to evaluate independently" whether the finding is supported by any information of quality. Such a statute, under *Gutierrez de Martinez*, constitutes "Congress[ional]... assign[ment] to the federal court only [of] rubber stamp work." *Id.* at 429.[5]

3. The PMOI Military Wing – The government argues that PMOI's lower court brief conceded that it engages in terrorist activity, because it "maintains an army (the National Liberation Army of Iran), and it carries out missions within Iran against military and strategic targets." Opp. at 12 (quoting Pet. CA Br. 27). Leaving aside PMOI's point that military force against oppressive governments does not, *ipso facto*, constitute terrorism, the Statute does not permit the Secretary to make designations of "terrorist activity" on the basis of maintaining an "army" or carrying out "missions." Rather, it demands a "factual basis" for specific defined

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[5] Our argument does not necessarily mean that Congress could never authorize "foreign terrorist" designations without any judicial participation at all. As the Court in *Gutierrez de Martinez* observed, while "Congress may be free to establish a compensation scheme . . . without court participation," "that is a matter quite different from instructing a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate." 515 U.S. at 430. Because Congress here has chosen to create a statutory right to judicial review of the "factual basis" for the Secretary's designation, Article III requires that the federal courts be able to "evaluate independently" the quality of the information in support of it. *Id.* at 426.

The government attempts to distinguish the search and arrest cases that prohibit judicial rubber stamping, Pet. at 10, on the ground that the constitutional right to an independent judicial evaluation of the factual basis for police conduct is derived from the Fourth Amendment. Opp. at 9. But the Fourth Amendment is merely the source of the right of review, just as § 1189 grants the right of review to PMOI. *Gutierrez de Martinez* makes clear that the independence of the review is required by Article III.

terrorist acts. 8 U.S.C. § 1189(a)(1)(B). None of Petitioner's briefs in the Court of Appeals admits any of the terrorist acts upon which the Secretary's designation (and the D.C. Circuit's affirmance) depends. Indeed, the same brief quoted by the government asserts that PMOI "eschews terrorism and violence against innocent civilians, it supports the Middle East Peace Process, it claims no credit for acts of international terrorism." Pet. CA Br. 6.[6]

Moreover, it is impossible from the Secretary's administrative record to determine whether, if the sole allegations of "terrorist activity" involved military operations of the NLA in Iran, she would have still designated PMOI as a foreign terrorist organization. The government certainly makes no such claim in this Court. On judicial review, the agency's action must "stand or fall" on the "determinative reason" for the action taken.[7] *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973). *See also FTC v. Sperry & Hutchinson Co.* 405 U.S. 233, 248-50 (1972) (remand to Commission required where factual findings not linked to Commission's conclusion); *Port of Portland v. United States*, 408 U.S. 811, 842 (1972); *American Trucking Ass'n v. United States*, 364 U.S. 1, 13-14 (1960).

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[6] The government cannot save the Secretary's "terrorist activity" finding by relying on alleged "admissions and claims of responsibility for terrorist attacks made by MEK officials" set forth in the SAR. *See* Opp. at 11 n.5. The Court of Appeals did not assess the reliability of any of the documents in the SAR, including those cited by the government, and PMOI categorically denied any participation in terrorist activity.

[7] The government emphasizes that "in deciding whether violent foreign organizations should be treated as terrorist, responsible officials in the political branches must make nuanced assessments of a variety of moral, practical and political considerations." Opp. at 12-13. These "nuanced" judgments cannot be made unilaterally by appellate counsel. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

4. The Constitutional Presence Issue. The government convolutes the second question presented by PMOI (whether PMOI has sufficient contacts to obtain review of its constitutional claims), by re-framing it as two issues on which the D.C. Circuit deliberately did not pass (whether PMOI's due process and First Amendment challenges have merit). The D.C. Circuit, not this Court, is the appropriate forum to adjudicate those claims in the first instance. Nothing in the government's opposition adequately meets PMOI's point that the D.C. Circuit's test for constitutional presence is inconsistent with this Court's decisions.

(a) The government mischaracterizes the lower court's opinion when it argues that the court's holding that PMOI lacks presence was based on the record as a whole. Opp. at 14. In context, it is clear that the transition phrase "[f]rom all that appears" refers to PMOI's concession of its "status as foreign," as described in the following sentence of the court's opinion (Pet. App. at 10a), and not to the record – of which the court made no mention at all. Even the government seems skeptical that the lower court considered the entire record when it asserts that the D.C. Circuit may reconsider PMOI's constitutional presence in the case challenging the re-designation, based on information already in the record of *this* proceeding that points to PMOI's ample presence in the United States. Opp. at 14 n.6; Pet. at 20-21.[8]

(b) The government is wrong to imply that the D.C. Circuit made a factual finding that PMOI had no property in

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[8] The government's claim that we cannot assert facts in the record in support of our argument lacks merit. Opp. at 14, n.6. PMOI did specifically draw the most important of those facts to the attention of the D.C. Circuit – that it regularly reports its activities in the United States to the Department of Justice, including "presentation of speakers, issuance of periodicals and other publications, hosting news conferences, [and] organization of rallies." PMOI CA Br. at 5; CA Pet. for Reh'g at 9. All the other citations merely add support to its contention that it is present here.

the United States. Opp. at 14-15. The Court "inferred" only that no PMOI property had been *seized* from an American financial institution. *Id.*; Pet. App. at 10a. The latter finding is not sufficient for the D.C. Circuit to have disregarded all of PMOI's constitutional claims, and provides no basis for distinguishing *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931), which was based on "acquiring and holding" property in the United States.

(c) The government claims that PMOI should be equated with foreign nations and denied any right to raise constitutional claims regardless of presence in the United States. Opp. at 15 (citing *Regan v. Wald*, 468 U.S. 222 (1984)). *Regan* does not stand for the proposition that foreign nations can never invoke the American constitution, much less that a foreign private organization may not. *Compare Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) (conducting "minimum contacts" analysis under due process clause). In any event, PMOI does not purport to be a foreign nation, but rather a private organization with its own policy objectives. This Court has articulated the touchstone of the ability of any foreign organization to assert constitutional claims as whether it has property or presence here – questions that the D.C. Circuit did not properly resolve in accordance with this Court's precedents.

(d) The government's argument that PMOI's constitutional claims lack merit should have no bearing on this Court's decision to grant certiorari, because it is not encompassed in the questions presented, was not resolved even implicitly by the court below, and is, in any event, wrong. The Secretary's designation affects both liberty and property interests, and presents colorable claims under the First Amendment. (1) The designation restricts the liberty of PMOI members living in the United States to travel abroad. *Zemel v. Rusk*, 381 U.S. 1, 14 (1965). The exclusion effect of the designation applies not only to aliens seeking "initial admission" to the United States, Opp. at 16,

but also to lawful resident aliens who wish to travel abroad and obtain a visa to return to the United States. 8 U.S.C. § 1182(a). (2) The designation further affects the liberty of members who wish to provide support to PMOI, whose common interests the membership organization has standing to assert. *United Food & Commercial Workers Union Local 751 v. Brown Group. Inc.*, 517 U.S. 544, 551-52 (1996); *Pennell v. City of San Jose*, 485 U.S. 1 (1988).[9] (3) The D.C. Circuit's erroneous finding that none of PMOI's property had been seized does not answer the question whether PMOI asserted the deprivation of a constitutionally protected interest. The designation provides that any of PMOI's property that is placed in U.S. financial institutions will be seized, thereby depriving PMOI at this time of the use of American channels of interstate commerce available to others. *Cf. Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (restriction of access to utilities is a protected interest). (4) The decision of the Ninth Circuit in *Humanitarian Law Project*, the only circuit to have addressed the First Amendment association claim under this recent Statute, hardly constitutes the final word on the subject. Even if it did, there is no suggestion from that decision that the parties in that case raised, or that the Court decided, all of the constitutional claims that were asserted by PMOI below.

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[9] To say that a liberty interest exists is not to say that it may not be proscribed pursuant to procedures that comport with due process. PMOI does not assert that the government has no power to restrict financial contributions to bona fide terrorists. But members of PMOI in criminal or immigration proceedings have no practical way to obtain collateral review of the question whether PMOI does, in fact, engage in terrorist activities in a manner that guarantees due process. PMOI was denied such a hearing by virtue of the court's holding that it has no constitutional presence; its members cannot obtain a hearing on the issue if charged under the criminal statute. 8 U.S.C. § 1189(a)(8).

CONCLUSION

For the reasons stated herein and in the Petition, the Court should grant the Petition and set the case for argument or summarily reverse and remand to the D.C. Circuit.

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